

THE HARMONISATION AND CO-ORDINATION OF SOCIAL SECURITY IN THE  
EUROPEAN COMMUNITIES: THE LAW AND ITS SOCIAL FUNCTION  
A COMMENTARY ON ARTICLES 51, 117, 118 OF THE TREATY OF ROME

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### ABSTRACT

The thesis is devoted to a study of the law regulating the harmonisation and co-ordination of social security in the European Economic Community. The first part examines the law governing harmonisation (especially Articles 117 and 118 of the Treaty of Rome), the socio-economic function of harmonisation and the relation between the legal interpretation of Articles 117 and 118 and the political conflict which surrounded their implementation. The second part analyses the legal provisions governing co-ordination (especially Article 51 of the Treaty of Rome, Regulation No. 3 and Regulation No. 1408/71), explores the question of their social function and relates their legal development to their changing socio-economic function.



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CHAPTER 1



## Chapter 1

### Introduction

The subject of this thesis is the law relating to the harmonisation and co-ordination of social security systems in the European Economic Community. The principal provisions governing harmonisation are Articles 117 and 118 of the Treaty of Rome. The law relating to co-ordination is to be found mainly in Article 51 of the Treaty and in Regulation No. 3 which has now been replaced by Regulation No. 1408/71. These regulations have been the subject of a large number of interpretative decisions by the European Court of Justice which, although very interesting, have attracted relatively little attention. This thesis may, as its sub-title indicates, be understood as a commentary on these legal provisions.

The question immediately arises as to the form which such a commentary should take, as to how the study of these provisions should be approached. The most obvious approach, and that which is adopted by most legal analyses, would be to study the provisions in a purely legal framework: to analyse the terms of the Treaty and of the relevant regulations, to expose the rights and obligations arising therefrom, to relate the various provisions to their legal precedents, to analyse the reasoning and the consistency of the case law relating to the provisions, to trace their legislative and judicial development, etc. Such an approach certainly does not necessarily exclude all reference to the external, "non legal" world: one might, for example, look briefly at the origins, the effect or even the wisdom of the legal provisions being analysed; but there is an implicit assumption that the lawyer should subject only the specifically legal

sphere to close scrutiny, that he must take the external world on trust, at its face value. The aim of legal study, in such a view, is to elucidate the law, to purify it of inconsistencies, to suggest ways in which the desired objective might be attained more neatly or more efficiently, perhaps also to point out apparent injustices.

The structure of this thesis reflects an attempt to go beyond the limits of the normal legal analysis. The objection to the normal approach lies precisely in its limited character. By accepting the legal framework as marking the bounds of the inquiry, it obscures the historical and social nature of that framework and of the provisions under scrutiny, it glosses over the inter-relations between these provisions and the other features of the social order of which they form but a part. By focusing exclusively on the internal coherence of the law, it blurs our image of the social function of the law, of the place of the legal provisions in the social order. The fault is not so much a moral or political one; the danger is rather that, by accepting as given a social order which is constantly changing, the student of the law excludes himself from a proper understanding of the law, for it is from changes in the socio-economic environment that impulses for the development of the law ultimately come.

If one wishes to transcend the limitations of the positivist approach described, it is necessary to relate the legal provisions under study to their social environment and to understand this environment as a changing one, driven forward by its internal contradictions. One must try to grasp, therefore, both the relations between the legal phenomenon being studied and the other significant features of the society and, at the same time, to understand the historical nature of the phenomenon<sup>(1)</sup>, i.e. to relate it not only



to the development of the law, but also to the general development of society. The aim of this approach is not so much to elucidate the law or to make suggestions for its reform, but rather to understand the social function of the law, its place in a particular society, and to see in what way the law is shaped by the changing needs of that society. Such an approach is, no doubt, more ambitious and more liable to go astray, but surely essential if legal study is to aim at throwing light on a particular aspect of society and not just at improving the means of social control.

Going beyond the positivist, internal analysis of the law does not mean, however, that such an analysis should be neglected or abandoned. On the contrary, it would be a mistake to try to explain the development and function of the law purely by reference to its external environment. It is in the very nature of the law in Western society that it is relatively independent of its environment, that it should confront social change with legal stability. The capitalist mode of production, unlike previous modes, requires, as Weber pointed out, a system of law which is calculable and predictable<sup>(2)</sup>. This need for calculability means that the law must, for some time at least, remain untouched by the currents of social change. It is the socio-economic environment itself, therefore, which requires that the law should have a certain degree of independence from that environment, that it should have its own internal coherence, its own logic, its own language. It is this appearance of autonomy and this actual relative autonomy which give to the positivist analysis of the law its apparent and indeed relative validity. To understand the development of the law, especially over a short period, it is necessary to understand the internal coherence of the law, to respect the speci-



ficity of the legal structure. If, for example, we wish to understand the significance of the decision of the Court of Justice in the case of Ciechelski (which will be discussed in Chapter 5), this can be done only within the framework of legal thought and a particular legal tradition, and not solely by reference to external pressures. In order to understand the development of this or any other law, it is necessary to study not only the external forces which may influence legislation and interpretation, but also the specific legal framework and tradition of which the law forms part. It is this need both to comprehend and to transcend the form in which the legal phenomenon presents itself which leads Poulantzas to suggest that, in studying the law, it is necessary to adopt a dual approach, or what he calls more precisely a "méthode dialectique interne-externe"<sup>(3)</sup>. An internal analysis is necessary to reveal the inner structure of the law being studied and the internal dynamic of its development; but this must be completed by an "external" analysis for, contrary to appearances, the law cannot long remain immune from social and economic change.

It would be wrong to claim that this thesis seeks to "apply" the method elaborated by Poulantzas: nevertheless, it is this method which has inspired the structure of the thesis. The study is divided into two parts: the first is concerned with the harmonisation of social security systems under Articles 117 and 118 of the European Economic Community; the second part deals with the co-ordination of social security systems in accordance with Article 51 of the European Economic Community. Each part consists of three chapters.

The first chapter of each part consists of an "internal" analysis of the relevant law. The aim of these chapters is to

examine the relevant provisions within a purely legal framework: to place the provisions within the relevant legal traditions, to analyse the rights and obligations to which the provisions give rise, to study particular problems of interpretation which have arisen, to look at the judicial and legislative development of the law. In the case of the law relating to harmonisation, the problems to be examined are relatively few and the chapter is correspondingly brief. The law relating to co-ordination, on the other hand, is extremely complex and demands a much lengthier treatment. In neither case is any attempt made at this stage to relate the law to external factors.

An "external" approach to the law is made in the second chapter of each part. The aim here is to try to understand the social function of the legal provisions, their relation to their socio-economic environment. In the case of harmonisation, we shall find that the discussion surrounding the application of the law leads, of its own momentum, to consideration of the social function of the law. In the case of co-ordination, however, no such discussion has taken place, and it is necessary to look at the socio-economic environment of the law before trying to situate the law within that environment. In each case, the concern will be not only with the origins of the legal provisions, but also with the changes which have taken place in the socio-economic environment and consequently in the relations of the provisions to that environment, i.e. in their social function.

After the "internal" and "external" analyses, an attempt is made in the third chapter of each part to relate the conclusions of the previous two chapters: to see to what extent the legal norms and their interpretation have followed the movement of their socio-economic



environment, or to what extent they have indeed remained untouched by external change<sup>(4)</sup>.

The subject of the study is two-fold: the harmonisation and the co-ordination of social security. The unity of the subject, obviously, is provided by the notion of social security. The bond of unity, however, is perhaps not as strong as might at first appear to be the case, for the two subjects differ in many respects. "Harmonisation" refers to the project of bringing into line the various social security systems of the member states of the European Communities: if this project were realised, it would affect these systems in their entirety, and all persons covered by them. More broadly, the discussion bracketed under the heading "harmonisation" refers to all attempts to elaborate a general Community policy on the development of social security. The term "co-ordination" as used in this context, is much more specific: it refers to attempts to minimise the loss of rights suffered by those who move from one national social security system to another, by using various mechanisms to co-ordinate the functioning of the social security systems in such cases. The only persons affected by co-ordination are the "migrants" (in the broadest sense of the word), and not those who remain within the domain of a single system.

Not only is the subject matter of each part quite distinct, but the relevant legal provisions are of a very different nature, and not merely because they are contained in different parts of the Treaty<sup>(5)</sup>. Those relating to the ambitious goal of harmonisation scarcely rise above the level of a vague declaration of intention, whereas the regulations which realise the more modest aim of co-ordination regulate the rights of migrants in very great detail. As one might expect, the relationship between the "internal dynamic" of the law and the influence



of external pressures is also very different in each case.

A word is necessary on the notion which runs throughout the whole thesis. The term "social security" is used in a special sense. In discussions in this area it is normally understood to refer to the nine branches of social insurance listed in Convention No. 102 of the ILO, i.e. those which provide medical care, sickness, unemployment, old age, industrial injury and industrial illness, family, maternity, invalidity and survivors' benefits. It is in this sense that the term is used in this thesis, unless otherwise specified. It should be noted that it does not normally include social assistance, although this is what is often popularly understood by the term in this country.

The contents of the social security systems vary greatly from country to country. Broadly speaking<sup>(6)</sup>, however, the systems of the original six member States (with which we are principally concerned) can be seen as belonging to the Continental rather than to the Anglo-Scandinavian tradition of social insurance, i.e. they start from the notion that the function of social security benefits is to replace the earnings of wage- and salary-earners during a period of forced inactivity and not primarily (as in the Anglo-Scandinavian tradition) to provide a guaranteed minimum income to all categories of the population. This distinction between the two traditions is rapidly becoming blurred<sup>(7)</sup>, but, as we shall see, it has left its mark particularly on the law relating to the co-ordination of social security schemes.

Beyond this, it is not necessary to describe the structure and evolution of the various systems. Our concern is not with the individual systems but with Community law and the policies behind that law - essentially Community policies. The aim is not, as in some studies in this area, to compare the contents of the different

systems and to make suggestions as to how they might be better coordinated or harmonised. The aim - as has already been stressed - is not an immediately practical one, it is simply to understand the development and the social function of the law being studied. It is this lack of immediate practical perspective which accounts also for the fact that the particular problems of Britain are not singled out for special treatment.

The absence of an immediately practical purpose does not, of course, mean that the thesis is intended to be useless, that it aspires to the realms of "pure science". The contrary is true: it is based on the belief that a proper understanding of the processes at work in society is essential for a conscious mastering of those processes<sup>(8)</sup>.

Part 1

Harmonisation



## CHAPTER 2

## Chapter 2

### The Legal Basis of Harmonisation

#### Introduction

At first glance, the provisions of the Treaty of Rome relating to the harmonisation of social security present little difficulty. Articles 117 and 118 are short, they have not formed the basis of any regulation or other legally binding act and they have given rise to no court decision: there is thus no need to deal with the hundreds of pages of regulations and the hundreds of court decisions which it is necessary to consider in treating the law on the co-ordination of social security under Article 51 of the European Economic Community. But this apparent simplicity <sup>(1)</sup> in fact conceals lively differences of opinion among the commentators ("la doctrine") as to the meaning of these articles and as to the powers and obligations which the Treaty creates in relation to the harmonisation of social security systems.

But before turning directly to the problems of interpretation raised by the European Economic Community provisions, we shall attempt to place these provisions within the context of international social security law.

#### Harmonisation of social security in international law

The traditional international law of social security knows two branches, both of which find their place in the Treaty of Rome. On the one hand, there is the co-ordination of social security systems, in order to provide protection for those (particularly migrant workers) who move from one national social security system to another. Co-ordination affects only a limited category of people and does not aim to

have any effect on the social security systems themselves. The second branch of international social security law is concerned with these systems: the aim here is that the national systems involved should accept certain common principles or adopt certain common standards.

The international harmonisation of social security is, as one might expect, far less developed than the international law of co-ordination. The norms<sup>(2)</sup> which do exist in this area have resulted, not from bilateral treaties, but from the work of international organisations<sup>(3)</sup>. In order to illustrate the techniques which have been developed in order to promote the acceptance of common principles and standards, it is sufficient to describe briefly the most important of these international norms, Convention No. 102 of the International Labour Organisation<sup>(4)</sup> and the European Code of Social Security, concluded within the framework of the Council of Europe<sup>(5)</sup>.

ILO Convention No. 102: Convention No. 102 lays down certain minimum standards to be satisfied by the social security systems of those states which ratify it. The problem in devising such a Convention, given the very great economic and social differences between the member states of the ILO, was to find some system of standards which would not be totally out of reach of the poorer countries, but would nevertheless have some relevance for the more developed systems. It was proposed at first to have two sets of standards, at a basic level for everyone and at a higher level for countries with more developed systems, but this proposal was abandoned in the face of the employers' opposition. As a result, the Convention, which was adopted in 1952, contains only one set of standards.



The Convention contains nine parts corresponding to the nine risks covered by most developed social security systems, namely: medical care; sickness benefit; unemployment benefits; old age benefits; industrial injury and industrial illness benefits; family benefits; maternity benefits; invalidity benefits; survivors' benefits. Each state ratifying the Convention is required to satisfy the standards it lays down with regard to at least three of these risks, according to its own choice, but one of which must be unemployment, old age, industrial injury, invalidity or survival.

For each of these nine branches of social security, the Convention lays down:

- (1) Minimum standards as to the proportion of workers or of the population who must be protected;
- (2) Appropriate conditions for the receipt of social security benefits and the duration of such benefits; the provisions of the Convention may be complied with either by schemes of the social insurance type or, in the case of certain contingencies, by means-tested benefits of the social assistance type;
- (3) Minimum rates of benefits. The rates must be sufficient to provide a specified sum for a "standard beneficiary", defined by the Convention, for the purpose of most contingencies, as a man with a wife and two children. The sum specified is not a fixed sum valid for all countries but is defined by reference to the average wage-rate of a typical unskilled adult male worker in the country concerned. For each contingency a percentage (from 40 to 50 in most cases) is prescribed, and the benefit in question must be at least equal to that percentage of the wage-rate, account being taken of any family allowances paid.

Other parts of the Convention deal with such matters as equality of treatment for non-national residents, disqualifications and the incidence of contributions for the benefits for which the Convention provides. These parts apply to all countries ratifying the Convention.

The techniques adopted by Convention No. 102 are certainly very flexible, but do they solve the problem of providing standards which are meaningful for rich as well as for poor countries? The existing social security systems of the countries with which we are concerned are sufficiently developed for the countries to ratify the Convention with regard to at least three of the nine risks, and in most cases to more than three. Once the minimum requirements of the Convention are satisfied, there is little incentive for states to modify their laws to meet the standards laid down in respect of those contingencies not covered by their ratification. Whatever the influence of Convention No. 102 in raising international standards of social security, it is hard to conceive of any real harmonisation except in a regional context.

European Code of Social Security: The Council of Europe regards it as one of its aims to promote social progress in its member states, and as early as 1950 it began to study the possibility of harmonising social security benefits in the various countries. Its work, conducted with the assistance of the ILO, met with considerable difficulties and it was not until 1964 that the European Code of Social Security was signed.

The Code is not in fact a "code" at all, but a convention modelled very closely indeed on Convention No. 102 of the ILO. The original ambition of trying to bring uniformity to the social security systems of Europe was abandoned in favour of an effort to raise the



minimum standards established by Convention No. 102. Essentially, the Code repeats the provisions of that Convention with only very slight modifications, but requires ratifying states to comply with six, instead of three, parts of the Code. However, of these nine parts corresponding to the nine risks, Part II (medical care) counts as two parts, and Part V (old age benefits) counts as three parts, because of the costs involved. Moreover, instead of specifying six branches, a ratifying state may specify only three branches providing they all fall within the group of five branches consisting of unemployment, old age, industrial injury, invalidity and survival. The result is that the Code constitutes only a very limited advance on Convention No. 102.

The only other innovation is the addition of a Protocol annexed to the code. This lays down, with regard to each branch, a higher set of standards which any state wishing to go beyond the minimum requirements may ratify.

#### The Treaty of Rome

If the authors of the Treaty of Rome had been determined to bring about a harmonisation of the national social security systems, there is no apparent reason why they should not have developed, on a higher plane, the legal technique which had already been used in Convention No. 102.<sup>(6)</sup> But, as is clear from the text of Articles 117 and 118 of the Treaty and as we shall see in the next chapter, the unambiguous will to harmonise did not exist. Whereas Regulation No. 3 on the social security of migrant workers built directly on the traditions of the international law of co-ordination and some knowledge of those traditions is essential to understand why it has given rise to so many problems of interpretation, the Treaty of Rome makes no use of the



techniques of international harmonisation law, as developed by Convention No. 102 and the European Code of Social Security.

Far from laying down explicit standards or principles for the social security systems of the member states, the Treaty, although it raises the issue of harmonisation, does not provide a very clear basis for Community action. It is the extent of this basis, the extent of the competence of the Community institutions, particularly of the Commission, and the extent of the obligations of the member States, which has been the centre of the controversy surrounding the provisions of the Treaty on harmonisation. Articles 117 and 118 provide the core of the law relating to harmonisation in the European Economic Community, but other provisions are also relevant. The following survey will look first at the rights and duties arising from Articles 117 and 118, then at the other legal provisions which have been called in aid to argue that the position of the Commission is in fact much stronger than at first appears to be the case, and finally at the action which has been taken under these provisions. Since there have been no judicial decisions on the subject, reference will be made primarily to "la doctrine", the body of interpretation developed by legal commentators.

#### Articles 117 and 118

Article 117 has been described as the "article-clé de l'harmonisation sociale"<sup>(7)</sup>, but, taken by itself, it does little more than throw the issue of harmonisation into the air:

"Les Etats membres conviennent de la nécessité de promouvoir l'amélioration des conditions de vie et de travail de la main-d'oeuvre permettant leur égalisation dans le progrès.

Ils estiment qu'une telle évolution résultera tant du fonctionnement du marché commun, qui favorisera l'harmonisation des systèmes sociaux, que des procédures prévues par le présent Traité et du rapprochement des dispositions législatives, réglementaires et administratives" (8).

Most commentators agree that the agreement declared in the first paragraph does not create any enforceable legal obligation for the member states. There are, however, different nuances of interpretation which, when taken together with other provisions of the Treaty, do lead to different appreciations of the duties of the member states. Thus, von der Groeben and von Boekh emphasise the lack of obligation arising from this article and deny that Article 117 provides any basis for a Community social policy:

"Artikel 117 geht davon aus, dass grundsätzlich die Mitgliedstaaten für die Sozialpolitik verantwortlich bleiben ... Deshalb setzt Artikel 117 für die Sozialpolitik der Mitgliedstaaten lediglich eine allgemeine Richtlinie ... und gibt weder Kommission noch Rat das Recht, sozialpolitisch tätig zu werden" (9).

Other commentators, however, emphasise not the lack of binding obligation but the formal declaration of intention which they see as an "engagement formel" (10) or as the statement of a formal aim of the Treaty (11). As we shall see later, this emphasis on the declaration of intention assumes importance when Article 117 and Article 118 are related to Article 5 of the Treaty.

At first sight, the second paragraph of Article 117 appears to do no more than express an expectation on the part of the member



states, but it does in fact carry our analysis forward, in two respects. It mentions the term "harmonisation", and it indicates the methods by which the objectives of the first paragraph are to be achieved.

No definition of the term "harmonisation" is given in the Treaty. Although it is generally assumed that the "harmonisation of the social systems" mentioned in the second paragraph refers to the "égalité dans le progrès" of the first paragraph, it is universally recognised<sup>(12)</sup> that "harmonisation" does not mean "égalité" in the sense of "uniformisation". As Quadri-Monaco-Trabucchi put it<sup>(13)</sup>:

"Armonizzare non è sinonimo di unificare ... Più che ad una identità si deve pensare ad un orientamento comune. E ciò non per un fine astratto e teorico, ma in vista dell'attuazione e del funzionamento del Mercato comune".

Few commentators would disagree with this, but the definition does no more than postpone the problem of interpretation, for there has been wide disagreement on what action is justified or required by the "attuazione e ... funzionamento del Mercato comune". Whereas Quadri-Monaco-Trabucchi<sup>(14)</sup> relate harmonisation to the objective announced in the first paragraph which they see as being the improvement of living and working conditions, other commentators (notably Wohlfarth-Everling-Glaesner-Sprung) argue on the basis of the origins of Article 117 as well as on the formulation of the first paragraph that the improvement of living and working conditions is intended to bring about their "égalité", that this "égalité" is the prime objective announced by Article 117, and that action to achieve this "égalité" is justified only on economic grounds, to remove dis-



tortions to free competition in the Common Market<sup>(15)</sup>. The argument concerning the definition of harmonisation thus resolves itself into an argument concerning the aims of harmonisation. Since it is our intention to examine this question in the next chapter, further consideration of the meaning of "harmonisation" must be postponed.

The second paragraph of Article 117 expresses the expectation that the objectives of the first paragraph will be attained in three ways: by the functioning of the common market, by the "procédures prévues par le présent Traité" and by the "rapprochement des dispositions législatives, réglementaires et administratives". Again, the differences of interpretation can be reduced mainly to differences of emphasis, but these differences of emphasis are not without consequence. The essential question is whether this paragraph urges action to achieve the objectives stated or whether, on the contrary, the ends sought are expected to be achieved automatically. The problem can be broken down into three questions: what emphasis is to be given to the "functioning of the common market"? What are the "procedures" to which the paragraph refers? And to what does the "rapprochement des dispositions" allude?

The difference in interpretation between those authors who emphasise the lack of binding obligation in the first paragraph and those who stress the element of agreement<sup>(16)</sup> is reflected in the importance which the various commentators attach to the "functioning of the common market" in relation to the other two means of attaining the stated objectives. Thus, Groeben<sup>1</sup>Boekh, who emphasised the continuing autonomy of the member states in matters of social policy, assert:

"Eine Verbesserung der Lebens-und Arbeitsbedingungen wird ... im wesentlichen aus der Automatik des Gemeinsamen Marktes ... erwartet"<sup>(17)</sup>

Quadri-Monaco-Trabucchi, on the other hand, place their stress on the need for action:

"Tale mezzo, non è ... sufficiente. Le conseguenze sul piano sociale dell'integrazione Europea non possono derivare solo, e quasi automaticamente, dall'attuazione del Trattato nei vari settori, ma devono essere sollecitate e favorite anche dall'attuazione delle procedure previste ..."<sup>(18)</sup>.

There are various versions of what these "procedures" may be. For Kahn-Freund they are "very obviously the steps which, in accordance with Article 8, will be taken during the transitional period, that is, before the Common Market can be said to "function"<sup>(19)</sup>. What is "very obvious" to Kahn-Freund does not even appear to have occurred to any of the other commentators. Most <sup>(20)</sup> assume that the phrase refers primarily to the other provisions of the Treaty concerning labour power<sup>(21)</sup>, but here again there are differences in emphasis: one can distinguish between those (such as Groeben-Boekh and Wohlfarth et al) who present the harmonisation merely as a possible result of the various other "procedures" connected with labour power, and those (principally Quadri et al) who present these "procedures" as forming a Community social policy necessarily involving a close collaboration between the member states in the social field<sup>(22)</sup>.

The third means by which the objectives are to be realised, the approximation of legislative and administrative provisions, is generally agreed to refer to Article 100 - 102, although, as we shall see when we



come to those provisions, these articles apply only in certain conditions.

Although the differences in the interpretation of Article 117 are primarily differences in emphasis, it is already possible to distinguish the different lines of approach to the problem of the extent of the legal basis for harmonisation and of the competence of the Community institutions, even although the Community institutions are nowhere mentioned in the article. Those who adopt a restrictive approach stress the fact that the article does nothing to limit the autonomy of the member states in their social policy and emphasise the expectation that harmonisation will result primarily and automatically from the functioning of the Common Market. Those who favour a broader interpretation point to the States' agreement on the necessity of harmonisation and interpret the reference to the "procédures prévues" as a reference to the various powers of action conferred on the Community institutions by the Treaty.

Whereas Article 117 concentrates on the member states, the subject of Article 118 is the Commission:

"Sans préjudice des autres dispositions du présent Traité,  
et conformément aux objectifs généraux de celui-ci, la  
Commission a pour mission de promouvoir une collaboration  
étroite entre les états membres dans le domaine social,  
notamment dans les matières relatives: .....

-A la sécurité sociale ...

A cet effet la Commission agit en contact étroit avec  
les états membres, par des études, des avis et par  
l'organisation de consultations, tant pour les problèmes  
qui se posent sur le plan national que pour ceux qui  
intéressent les organisations internationales.



Avant d'émettre les avis prévus au présent article,  
la Commission consulte le Comité économique et social.<sup>(23)</sup>

It is generally assumed that Article 118 should be read together with Article 117 and hence that the aim of the collaboration which the Commission has the task of promoting should be the harmonisation or "egalisation" declared by Article 117 to be necessary. But Article 118 does little to clear up the difficulties of interpretation raised by Article 117; on the contrary, those who favour Community action can point to the task entrusted to the Commission as evidence that the intention expressed in Article 117 did constitute an "engagement formel", while those who argue that there is no basis for a Community social policy, except on very specific points, can point to the weakness of the powers transferred to the Commission.

The Commission is entrusted with the mission of promoting close collaboration between the member States, but the only ways in which it can act are through studies, opinions and the organisation of consultations. Two questions have caused difficulty. To what extent are member States obliged to collaborate with the Commission? And to what extent has the Commission a right of initiative in organising studies and consultations?

Quadri et al argue that, by entrusting the Commission with the task of promoting collaboration between them, the member States have assumed the obligation to collaborate and cannot, without infringing their obligations under Article 5 of the Treaty, refuse to collaborate in the studies or participate in the consultations organised by the Commission<sup>(24)</sup>. Wohlfarth et al<sup>(25)</sup>, emphasising the autonomy of the states in the area of social policy, deny that they are under any obligation to collaborate, except in so far as they are obliged to supply information under Article 213 of the Treaty<sup>(26)</sup>. But this

reference to Article 213 does not really solve the problem, for that article gives the Commission the right to collect information only "dans les limites et conditions fixées par le conseil en conformité avec les dispositions du présent Traité". This merely raises the question of how far the Treaty gives the Commission the right to organise studies etc. on its own initiative.

Here, again, opinions differ. The Commission has forcefully asserted that it does have a right of initiative. In its own words:

"La Commission de la CEE a réaffirmé, à maintes reprises, sa compétence et ses pouvoirs à entreprendre, également dans les matières indiquées à l'article 118, toutes les études qu'elle estime nécessaires, et à organiser toutes les consultations qu'elle estime opportunes, surtout avec les partenaires sociaux"<sup>(27)</sup>

Others, however, have argued from the fact that the member states preserve their autonomy in this field and from the fact that the Commission is to act "in close contact" with the member states that the action of the Commission must be subordinate to the wishes of the member States<sup>(28)</sup>.

Thus, the differences of opinion concerning Article 118 centre around the interpretation of Article 117: does Article 117 merely express an intention and an expectation of the member states, or does it mark out, if not an area of Community policy, at least an area of Community concern? Those who take the former approach see the task of the Commission as that of an assistant to the member states. Those who see Article 117 as setting out an objective for the Community regret the disparity between the magnitude of the goal (and consequently of



the mission entrusted to the Commission) and the paucity of the powers given to the Commission. Consequently, they try to interpret those powers as widely as possible.

Those who adopt this approach have also tried to find provisions in the Treaty which would strengthen the position of the Commission, i.e. to find other legal bases for action designed to bring about a harmonisation of social provisions. It is necessary, therefore, to complete our discussion of the legal basis for harmonisation by looking at these other provisions.

#### Other relevant legal provisions

The reference to other articles of the Treaty in support of the objectives of Article 117 and 118 is justified both by the references in Article 117 to the "procédures prévues par le présent Traité" and to the "rapprochement des dispositions législatives, réglementaires et administratives", and by the fact that the mission entrusted to the Commission by Article 118 is "sans préjudice des autres dispositions du présent Traité".

The provisions which have been invoked to strengthen the position of the Community can perhaps be divided into procedural provisions, which could be used to give the Commission's action under Article 117, 118 more force, and the more substantive provisions which provide a basis for action in their own right.

Of the "procedural" provisions, we have already mentioned Article 5<sup>(29)</sup>. Both paragraphs of this article have been invoked against the member states. Quadri et al have argued that a refusal of the member states to co-operate in the studies and consultations initiated by the Commission would constitute a breach of their obligation under the first paragraph of Article 5 to facilitate the



accomplishment of the Community's mission and also of their obligation under the second paragraph to abstain from measures likely to imperil the realisation of the aims of the Treaty<sup>(30)</sup>. Caesar goes even further than this:

"Selbst wenn man von dem Standpunkt ausgeht, dass es grundsätzlich Angelegenheit der einzelnen Staaten der EWG ist, ihre Sozialpolitik selbst zu bestimmen, wird man auf dem Gebiet der sozialen Sicherheit auf Grund des Art. 117 und des Art. 5 Abs. 2 des EWG-Vertrages die Verpflichtung der einzelnen Regierungen herleiten müssen, dafür Sorge zu Tragen, dass die Rechtsunterschiede auf sozialem Gebiet sich nicht weiter vergrößern, sondern vielmehr sich einander anpassen sollen"<sup>(31)</sup>.

These references to Article 5 in support of the Commission's position are, however, open to query. Quadri's argument based on the first paragraph rests on a rather broad interpretation of the notion of the "Community's tasks", while the reference to the second paragraph assumes that the aims announced in Article 117 can be included among "the objectives of the Treaty": but it is precisely this which is contested by those who would limit the action of the Commission. Moreover, whereas Quadri's argument is consistent with one interpretation of Article 117, Caesar's extension of this argument is less tenable, for it assumes, apart from anything else, that there exists some commonly accepted notion of what harmonisation means, which is not the case.

The Commission has also sought to reinforce its authority slightly by making use of its general power under Article 155<sup>(32)</sup> to issue recommendations. A recommendation is no more binding than an

opinion, but it may carry slightly more moral force<sup>(33)</sup>. This practice has met with some opposition, but there seems to be little legal foundation for such opposition. The Commission has, in fact, issued two recommendations<sup>(34)</sup> designed to encourage the harmonisation of social security.

It has been suggested that the Commission should make use of two other procedural provisions to strengthen its powers, Article 121<sup>(35)</sup> and Article 235<sup>(36)</sup>, but both of these provisions require unanimous agreement on the part of the Council, and this has not yet existed. Should the unanimous desire to take action ever come into being, these articles could, of course, be used, if no other basis for action were found.

More interesting than the appeals to procedural devices are the attempts to find a basis for action in more substantive provisions. These attempts raise again the question of the meaning and the aim of harmonisation.

Article 117, we saw, refers to the "rapprochement des dispositions législatives ...". It is generally accepted that this is a reference to the chapter of the Treaty entitled "Approximation of Laws", which consists of three articles, Articles 100 - 102. The first two of these articles give power to the Council if certain conditions are fulfilled, to issue directives (which are, of course, legally binding on the member states) requiring the approximation of legal or administrative provisions. Since Article 117 refers to these articles, and since Article 118 is "without prejudice to the other provisions of this Treaty", there is *prima facie* no reason why these provisions should not be used to bring about an approximation of social security laws, providing always that the requisite conditions mentioned in the



articles are fulfilled<sup>(37)</sup>.

The condition required by Article 100<sup>(38)</sup> is that the provisions to be approximated should be such "as directly affect the establishment or functioning of the common market". This is rather an ill-defined condition. Firstly, it is not clear what is meant by "directly". Cannella has argued that although disparities in social security provisions may have an effect on the functioning of the common market, such an effect would be negative and indirect, and that the consequences of the disparities would not be such as could "influer sur le marché commun par un lien étiologique, direct et immédiat"<sup>(39)</sup>. But to admit, as Cannella does, that disparities in social security provisions distort competition and disturb the free movements of capital and workers and yet deny that they have a "direct" effect on the functioning of the common market seems at best arbitrary.

More significant is the fact that Article 100 can be used to approximate legislations only where it can be shown that the existing disparities "affect the establishment or functioning of the common market. By interpreting "common market" in its popular sense, as a synonym for the European Economic Community, and by seeing the "functioning of the common market" in the light of the very broad aims expressed in Article 2, it is possible to reduce this limitation to complete insignificance. It has been more usual, however, to interpret "common market" in its narrower, literal sense. The aim of approximation under Article 100 must, according to this approach, be primarily an economic one; to remove obstacles to the creation or functioning of the new, enlarged market<sup>(40)</sup>. However, this raises a problem, for those authors who favour a broad interpretation of Articles 117, 118, i.e. those authors who interpret these articles



as creating a task for the community without giving it sufficient powers and who therefore look to other articles to find these powers, tend to interpret the aim of harmonisation as being primarily a "social" one - the improvement of working and living conditions<sup>(41)</sup>. In other words, Article 100 is not seen by these authors as filling the gap between the task entrusted to the Commission by Articles 117, 118 and the insufficiency of the powers vested in it. The difficulty is a real one, for harmonisation which takes as its starting point the removal of obstacles to the functioning of the common market will tend to focus on the costs of social security schemes to employers, whereas harmonisation which aims at the improvement of working and living conditions will concentrate on the level of benefits, and the results of the two types of harmonisation may be very different indeed<sup>(42)</sup>.

A way out of this dilemma is suggested by Kapteyn-Verloren van Themaat:

"Een onderlinge aanpassing van sociale zekerheidsstelsels op grond van sociale overwegingen ... Zou wederom op artikel 100 kunnen worden gebaseerd, indien men de rechtstreekse invloed op de instelling of de werking van de gemeenschappelijke arbeidsmarkt kan aantonen"<sup>(43)</sup>.

The line suggested here would presumably be to argue, not that disparities in social security charges distort competition between producers of different countries and hence affect the functioning of the common market of goods, but that disparities in social security benefits act as an obstacle to the migration of workers and thus affect the functioning of the common labour market. On this basis, it would be possible to justify a harmonisation aimed at raising the level of benefits, an "egalisation dans le progres" in the terms of Article 117.

The main objection to this approach is that Article 51 already gives the Council power to "adopt such measures in the field of social security as are necessary to provide freedom of movement for workers"<sup>(44)</sup>. As we know, the Council has already adopted measures under this article, but these measures are designed to co-ordinate and not to harmonise the national systems, i.e. they affect only those insured workers who move from the area covered by one system to that covered by another and they leave the individual systems untouched. If it were felt that this co-ordination was insufficient, that some degree of harmonisation was also necessary to ensure that the continued existence of separate social security systems did not constitute an obstacle to labour mobility, then surely there is no need for recourse to Article 100, since Article 51 gives the Council power to "adopt such measures ... as are necessary to provide freedom of movement for workers". It might be difficult to establish that harmonisation was "necessary" to achieve this aim, but if this were established, there seems to be no reason why Article 51 should not be used as a basis for harmonisation<sup>(45)</sup>.

The only attempt which the Commission has actually made (until recently) to use Article 100 in pursuit of the objectives of Articles 117, 118 was in a proposal for a directive to harmonise security requirements for "pistolets de scellement" used in the building industry. The harmonisation of these requirements was in any case justified on economic grounds, but the Commission also justified its proposal by relating it to the prevention of accidents in accordance with the aims of Articles 117 and 118. This caused considerable controversy, and the proposal was not accepted<sup>(46)</sup>. It is difficult, besides, to see how social security provisions could be harmonised in



this way, under cover of the standardisation of regulations applying to goods.

In short, the arguments that Article 100 can be used as a basis for harmonisation based on social considerations, i.e. aiming primarily at the improvement of working and living conditions, are not very convincing. This does not mean that a sympathetic Council could not interpret Article 100 broadly in order to achieve the ends it desired. In this respect, it will be interesting to see the result of the Commission's new attempt to use Article 100 as a basis for directives in what is considered to be the sphere of social policy, namely, on collective redundancies, equal pay for men and women, and the rights of workers in the case of a merger.<sup>(47)</sup>

The restriction of Article 101<sup>(48)</sup> and Article 102<sup>(49)</sup> to measures based on economic considerations is somewhat clearer. These articles give the Council power to take action only where "a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the common market and that the resultant distortion needs to be eliminated". There is no reason why, if this condition were fulfilled, action should not be taken under these articles to remove disparities between the various social security systems, but the aim of such action would, of course, have to be the removal of distortions to competition.

It should be noted that Article 100 and 101 give power to the Council to act by directive. Under Article 101, such directives may be issued on the decision of a qualified majority since the ending of the first stage of the transitional period, under Article 100 the decision to issue the directive must be unanimous. But even where



the Council must act unanimously, the Commission will have more influence and more chances of success in proposing a directive under Article 100 than it would have in recommending concerted action under Article 118: this results from the established procedures of Community negotiation and the Commission's role in such negotiations<sup>(50)</sup>.

Finally, some authors (notably Kapteyn-Verboren van Themaat)<sup>(51)</sup> have suggested that a basis for harmonisation might be found in provisions which mention neither social policy nor the approximation of laws but the co-ordination of economic policies. But this presupposes a certain view of the purpose and function of the harmonisation of social security provisions, and it is more convenient to postpone consideration of this argument until a later chapter<sup>(52)</sup>.

#### Measures Taken

All the measures taken which have aimed at harmonisation or encouraged collaboration in the field of social security have been taken under Articles 118 and 155. Two recommendations have been issued by the Commission, numerous consultations have been organised and studies published. Before drawing a conclusion to this chapter, we shall survey briefly the principal results of the Commission's work.

Both of the recommendations concern industrial diseases. The first, issued in 1962<sup>(53)</sup> proposed to the member states the adoption of a "European list of industrial diseases". Although each state had a list of industrial diseases and about fifty diseases were recognised as such by the various states, only a dozen of these diseases were common to all six national lists. The Commission drew up a list of all diseases recognised as "industrial diseases" by the various national lists and recommended that each state should adopt that list. The Commission also proposed that the states should adopt a "mixed system",

i.e. that, in addition to recognising a list of diseases which give rise to a legal presumption that they resulted from the employment of the victim and thus entitle him to a higher rate of benefit, the states should recognise the right of the victim to show that his particular illness, although not featuring on the recognised list, did in fact result from his employment and that he is thus entitled to the industrial disease rate of benefit.

The second recommendation, issued in 1966<sup>(54)</sup> aims principally at the suppression of the limiting conditions to which the payment of such benefits are made subject, conditions concerning, for example, the clinical manifestations of the infections, the types of employment concerned or the period within which the disease must be observed after the exposure to the risk.

The recommendations have met with some, but not with complete success. The proposals of the Commission, and particularly the European list of industrial diseases, have certainly had some influence on the laws of the member states, but no aspect of either recommendation has been adopted in its entirety by all the member states. Progress has been made, but differences still exist between the lists of the various countries, the mixed system has been adopted without restriction only in France, Germany and in Luxembourg, and the conditions which the later Recommendation aimed to suppress still exist, particularly in France and Italy. In addition, the Netherlands abolished the whole system of special benefits for industrial injuries and diseases by legislation of 1967, though this, of course, in no way contravenes the liberalising spirit of the Commission's recommendations<sup>(55)</sup>.

Of the consultations organised by the Commission, the most important has been the European Social Security Conference<sup>(56)</sup> held in



1962, which brought together representatives of trade unions, employers' organisations and social security institutions, as well as independent experts, with representatives of the governments participating as observers. In addition, regular contacts take place both within the framework of the Council and of the studies undertaken by the Commission<sup>(57)</sup>.

The studies<sup>(58)</sup> published are probably the most valuable result of the Commission's work to date. In addition to publishing regular statistics, the Commission has published, inter alia, descriptive studies on the structure, benefits and financing of the general social security systems of the member states and on the special and "complementary" or occupational schemes. In recent years, it has undertaken a number of studies on the economic aspects of social security, on its economic impact and on its financial problems, and it is currently engaged in the elaboration of a "social budget" for the Community.

### Conclusion

It has not been the purpose of this chapter to reach any firm conclusion as to the exact extent of the rights and obligations of the parties concerned with the harmonisation of social security. The aim has been rather to outline the main arguments concerning the existence and extent of a legal basis for harmonisation and the extent of the rights and duties of the Community institutions and the member states under the various provisions of the Treaty. We have made a deliberate attempt to restrict the argument to a consideration of the legal provisions of the Treaty, preferring to leave "extra-legal" considerations to subsequent chapters. It is perhaps helpful to conclude the chapter by repeating briefly the main lines of the analysis.



Two approaches to the interpretation of Articles 117 and 118 may be distinguished, a "narrow" and a "broad" approach, typified respectively by the analyses of Groeben-Boekh on the one hand, and Quadri-Monaco-Trabucchi on the other. Those who adopt the narrow approach take the view that these articles do nothing to restrict the autonomy of the member states in the social field and do not establish a basis for a general Community social policy. They maintain that the member states expected harmonisation to result automatically from the functioning of the common market and regard the weakness of the powers entrusted to the Commission as being fully consistent with this approach. Those who favour the broad interpretation on the other hand argue that Article 117 establishes harmonisation as one of the aims of the Treaty and that Article 118 entrusts the Commission with promoting that harmonisation without, alas, putting the necessary instruments at its disposal. Hence a gap exists<sup>(59)</sup>, in this view, between the duties of the Commission and the powers at its disposal, and a gap which one must try to fill by reference to the other provisions of the Treaty.

Thus, it is those who adopt the broad interpretation who lead the argument on to other articles of the Treaty. However, the other articles of the Treaty fail to "fill the gap", or at least fail to fill it in the way in which those who favour the broad interpretation of Articles 117 and 118 want to fill it, for the latter generally interpret harmonisation as the harmonisation of benefits in order to raise social standards, whereas, if we leave aside the procedural provisions (Articles 5, 155, 121, 235), the only articles<sup>(60)</sup> which supply the necessary instruments to "fill the gap" (principally Articles 100 - 102) restrict the use of those instruments to the

pursuit of "economic" ends, i.e. the removal of obstacles to the functioning of the common market or distortions to competition. Whether one regards the gap as being filled, i.e. whether one regards the Treaty, as it stands, as providing a sound basis for the harmonisation of social security systems, depends on how one interprets "harmonisation", on what one thinks to be the aim of harmonisation.

### CHAPTER 3



### Chapter 3

#### The Function of Harmonisation

Very little has been done under Articles 117 and 118 EEC, yet harmonisation (or indeed non-harmonisation) of social security in the EEC has been the subject of continuous debate since the mid-1950s. We shall therefore start from this debate, which has centred on the aims, that is, on the necessity or otherwise, of harmonisation.

The debate has not been a purely academic one. The arguments put forward have almost always been advanced in support of certain interests. Thus, the struggle between the two principal lines of approach, the "social" and the "economic" closely mirrors a clash between the interests of the trade unions and employers on one plane, and between those of the Commission and the Council on another.

A turning-point in the discussion comes in 1966, when the Council imposes a practical consensus. After this date, the whole discussion moves to a new level of seriousness. After this date too, it becomes clearer how the question of an EEC social security policy relates to the development of the EEC in general, to the changes which were taking place in the economic policy of the Member States in the mid-60s, and indeed to the development of modern capitalism in Western Europe.

I shall look first at the origins of Articles 117, 118 EEC, then at the debate which ensued between 1958 and the meeting of the Council of Ministers in December 1966. This will be followed by an analysis of the new concept which has been emerging since that date, which should permit us to look finally at the implications for the future of an EEC social security policy.

The aim of this chapter is not to look at the various national social security systems and make suggestions as to how they might

be harmonised: this has already been done by experts<sup>(1)</sup>. The immediate aim is not a practical one; the aim is not to make positive proposals but merely to try and understand what the discussion under Articles 117, 118 is all about, that is, how it relates to general political and economic development.

#### Origins of Articles 117, 118

It has often been remarked that the Title of the Treaty devoted to social policy contains only twelve of the 248 articles of the Treaty. What is perhaps more remarkable is that any part of the Treaty at all is devoted to social policy. For, although it might be argued that the ultimate aim of economic activity is social, the immediate aim of the Treaty-makers was to create an economic union, and only such provisions as were deemed necessary to that end were included in the Treaty. If we can accept the word of Mr. Veldkamp, the former Dutch Minister of Social Affairs:

"On est parti du principe qu'il fallait régler tout ce qui était de nature à perturber artificiellement les règles de concurrence, en d'autres termes, tout ce qui pouvait aboutir à des distorsions sur le plan économique, mais que la réglementation des conditions sociales et la politique sociale en soi - c'est-à-dire indépendamment des efforts en vue de l'instauration de l'unité économique - n'étaient pas nécessaires"<sup>(2)</sup>.

The inclusion of the social provisions in the Treaty was by no means a deviation from this principle, it was not an attempt to make the Treaty more "social", but resulted from economic motives<sup>(3)</sup>.

The French government, supporting the claims of the French employers<sup>(4)</sup>, maintained during the negotiations that the social



charges<sup>(5)</sup> borne by employers were higher in France than in the other negotiating states and that, consequently, French industry would be placed at a disadvantage in competition in the Common Market. They argued that this was an "artificial" rather than a "natural" distortion of competition, that is to say, that the social charges were not the result of the free play of market forces but were imposed on the market by the State, acting no doubt to protect the interests of the workers. The existence of disparities between the social charges in the various countries would therefore constitute a hindrance to the establishment of a common market, and should be removed by harmonisation. In particular, they called for equal pay for men and women (already notionally attained in France) and the harmonisation of the length of the normal working week and of the financing of social security.

The governments of the other negotiating states, led by Germany and supported by the conclusions of a study published by the ILO on "social aspects of European economic co-operation"<sup>(6)</sup>, did not agree that harmonisation of social charges was necessary for the creation of a common market. They argued that social charges were not "artificial" but "natural", that, like wages, they resulted from the operation of the market; and that anyway, distortions of a global character (such as those arising from general taxes or social security charges) are compensated for by other mechanisms in the economy<sup>(7)</sup>.

The result was a compromise<sup>(8)</sup>. The chapter of the Treaty entitled "Social Provisions" sketches out an area of social policy without providing any real means by which the policy can be implemented. As has been seen in the last chapter, the member states agree, in Article 117, on "la necessite de promouvoir l'amelioration



des conditions de vie et de travail de la main d'oeuvre permettant leur egalisation dans le progres". But, if they did believe it was necessary, they were not prepared to commit themselves to any action: "Ils estiment qu'une telle évolution résultera tant du fonctionnement du marché commun, qui favorisera l'harmonisation des systèmes sociaux, que des procédures prévues par le présent Traité et du rapprochement des dispositions législatives, réglementaires et administratives". In addition, the Commission has the task (under Article 118) of promoting close collaboration between the member states in the social field, one of the areas specifically mentioned being that of social security.

It is a rather confused and clumsy compromise<sup>(9)</sup> which leaves more than ample room for debate between those who favour harmonisation for whatever reason, and those opposed to it. The area for debate is extended by the fact that, although the removal of distortions of competition was the motive for including these provisions in the Treaty, competition is nowhere mentioned, the only reason given for wanting harmonisation being "l'amélioration des conditions de vie et de travail de la main d'oeuvre". Although the argument of the French government did not prevail, it did succeed in setting the problems of the harmonisation of social security firmly within the area of Community debate.

It is interesting to note that the basis for the French argument (and hence for the inclusion of Articles 117, 118 in the Treaty) is a liberal economic notion. Disparities in social charges are seen as constituting a hindrance to the creation of a free market, a hindrance that must be cleared out of the way so that the economy of the Common Market could operate smoothly. This is

very different, as we shall see, from the economic notions on which the latest discussion is based.

Debate on the aims and meaning of harmonisations: 1958-1966

After the Treaty came into force, the Commission was faced with the confused compromise embodied in Articles 117, 118. There was no agreement on the necessity for the harmonisation of the social security systems, nor on what "harmonisation" meant in this context, nor on how it should be carried out. There was general agreement that the social security systems of the Six could not be made uniform immediately and<sup>(10)</sup> that the goal was not "uniformisation", but "harmonisation", which was not the same thing. Very many definitions have been given of "harmonisation", but any attempt to define it as though it had some meaning in isolation from the aims pursued, seems foredoomed to sterility.

More interesting than the attempts to define the notion in abstract are the reasons which have been given to explain why the harmonisation of social security is necessary. The first years of the EEC (up to 1966) are characterised by the rejection, at least by the Commission and the trade unions, of the removal of distortions to competition as the prime aim of harmonisation, in favour of the more nebulous "social progress", that is, by the rejection of the "economic" for the "social" approach. Let us look separately at each of these two lines of argument.

Competition<sup>(11)</sup>

The argument put forward by the French employers at the time of the negotiations has already been stated: where the social security charges borne by the employer are heavier in one country



than in the others, this will mean that the labour costs and hence production costs of that employer will be artificially raised and that he will be placed at an unfair disadvantage vis-a-vis competitors in other countries. Conversely, where a state reduces the charges on the employer (for example, by taking a greater part of the financing of social security benefits on itself), this operates as a subsidy which gives that state's producers an advantage over foreign competitors. Hence, it is argued, it is necessary to harmonise at least the financing of the social security systems in order to remove these distortions. Benefits may incidentally be affected by the financial harmonisation, but that is by the way.

This argument has met with resistance on a number of grounds, both economic and social. From the social point of view, the argument is unsavoury. Clearly, harmonisation of the financing of the social security systems is bound to affect benefits and the redistributive effect of those systems. If harmonisation is carried out merely with a view to removing hindrances to competition, there is a great danger that benefits could be adversely affected.

Perhaps more important is the economic objection that the French argument is incorrect, or at least grossly over-simplified.

Firstly, it is unrealistic to compare social security charges in isolation. For the purpose of the French argument, these charges matter only in so far as they affect production and, more particularly, labour costs. But the relationship between social security charges and the other components of labour costs (wages and taxes) is far more complex than the French argument suggests. It is quite untenable to see social security charges as simply being imposed on top of other labour costs. Thus, high social security charges may well be compensated for by low wage costs,



and low social security charges by high wage costs or high taxes<sup>(12)</sup>.

High social charges may be accompanied by relatively low wage costs, because, especially if the high charges correspond to high benefits, the employer will often be able to make his workers accept correspondingly lower wages, or, in other words, he will be able to pass the costs on to his workers<sup>(13)</sup>. This interdependence of social security benefits and wages is expressed in the notion which sees the benefit as an "indirect or deferred wage"<sup>(14)</sup>. Thus, Montes, for example, observing that, in spite of the growing importance of social security in the French national income, the proportion of that income going to wage-earners has not increased, deduces from this that the growth in social security benefits has taken place at the cost of a slower rise in direct wages<sup>(15)</sup>. If this is so, then clearly the whole distinction between "natural" and "artificial" distortions breaks down.<sup>(16)</sup> Although the rates of social security contributions and benefits may be fixed by the State, this does not mean that they are not subject to the influence of, or in turn affect, the market and social forces which determine wages.

This relationship between wage costs and social security charges is of course disturbed when the State steps in. If the State takes on a big share of social security costs, this may indeed lighten the burden on the employer, for, if the benefits are accompanied by lower wages, the State is in effect paying part of his wages for him. Thus, one of the motives of the British Government in taking on the financing of such a large part of the British national insurance benefits was reportedly to boost exports<sup>(17)</sup>. What the effect of the state participation will be on the production costs of the producers depends, however, entirely on how the state participation is financed,

that is, on the system of taxation. Thus, it may well be that low social charges will be compensated for by higher taxes.

It is hardly surprising, then, that there is no simple relation between social charges and labour costs. Schork<sup>(18)</sup> points out that the harmonisation of social charges would increase, rather than reduce disparities in labour costs, if other elements remained constant. Although it is no doubt true that, in the short term, the producers of one country may gain an advantage in competition from the way in which their social security system is financed, it does not seem that a simple harmonisation of social charges would solve the problem.

The second part of the economic objection to the French argument is that whatever competitive advantage is gained will in any case only be a short-term advantage. Even where heavier social charges are not compensated for by lower wages or taxes, the resulting competitive disadvantage will in the long term be balanced out by the exchange rate mechanism. Existing disparities in social security charges, at least as long as they are global and not limited to any particular sector, will not affect competition because they will already have been accounted for by modifications to the rate of exchange<sup>(19)</sup>.

There are two limitations to this exchange rate argument. Firstly, it applies only to disparities affecting the whole of the economy. Where there is a specific distortion, that is, where the charges to which a specific industry<sup>(20)</sup> is subject differ from the national average and from the charges imposed on that industry in the other countries, this inequality will not be corrected by the exchange rate mechanism. In such a case, even the opponents



of the French argument agree that, in theory, harmonisation may be necessary in the interests of fair competition. In practice, however, for all the reasons already given, it would be extremely difficult to know whether and to what extent such specific distortions existed. Such specific harmonisation would, it is argued, require far more information than is at present available and should in any case be attempted only in extreme cases<sup>(21)</sup>.

The second limitation is that the argument applies only to already existing disparities. But any innovations which substantially affect social charges - whether they increase or decrease existing disparities - will disturb the balance between the economies concerned. Within the framework of a Common Market (and particularly when it is aiming at monetary integration), monetary fluctuations are particularly undesirable and the imbalance created will not so easily be corrected by the exchange rate mechanism. Therefore, in the interests of monetary stability as much as in the interests of competition, what is necessary is not a harmonisation of social security charges, but, on the contrary, a harmonisation of the rate of change of these charges. The charges themselves must not be harmonised or, if they are harmonised for reasons other than competition, then this should be done very slowly and with extreme caution<sup>(22)</sup>.

It is to be noted that the argument has now moved to a different level. Whereas at first it was in terms of the production costs of the individual producer, it is now becoming clear that the harmonisation of social security cannot be discussed outside the macro-economic context, outside the context of economic and monetary integration. This is to become increasingly obvious after 1966.



In view of these arguments and of the complexity of the whole question, the removal of obstacles to competition was soon rejected as a ground for calling for harmonisation, at least in the short term. The economic objections (put forward mainly by the German employers and their allies) robbed the original French argument of its force<sup>(23)</sup>. In the recent negotiations on the accession of the U.K. to the EEC, when, in view of the important participation of the state in the financing of the British national insurance system, one might have expected that the issue would arise, it seems that it was not even mentioned<sup>(24)</sup>.

With the competition argument, the original reason for including Articles 117, 118 in the Treaty, out of the way, or at least absorbed into a long-term economic argument, one might have thought that the discussion on harmonisation would lose all heat. In fact, however, the Commission and the trade unions introduced a new element into the discussion: rejecting the idea that harmonisation was necessary in the interests of competition<sup>(25)</sup>, they nevertheless argued that it was desirable - for social reasons. Attention is turned to what first appeared to be stylistic embellishments in Article 117 - "l'amélioration des conditions de vie et de travail de la main d'oeuvre" and "égalité dans le progrès". Although the original argument based on competition is rejected, nevertheless,

"l'harmonisation reste un objectif parce  
qu'elle porte en soi l'annonce de la volonté  
de progrès sociaux qu'implique l'amélioration  
des conditions de vie et de travail"<sup>(26)</sup>.

It was the rejection by the unions and by the Commission of the original "economic approach" in favour of this "social approach"

which led to the vehement clashes between employers and unions at the 1962 Social Security Conference and to the tension between Commission and Council which came to a head in 1966.

### Social Progress

The view that the aim of social security harmonisation is social progress (and that harmonisation is desirable for this reason) may follow a number of lines of approach.

The most extreme form of the argument is to identify "harmonisation" with "upward alignment". If the expression "egalisation dans le progres" is to be taken literally, it is argued, one must look at the standards of protection in the various countries, taking each branch (or indeed each aspect of each branch) separately, and raise the standards of the other countries to that of the country which gives the best protection in that branch (or with regard to that aspect). This might mean, for example, that all the countries would raise their old age pensions to the German level, maternity and sickness benefits to the Dutch, industrial injuries benefits to the Luxembourgish, unemployment benefits to the Belgian and family benefits to the French level.<sup>(27)</sup> Such a proposal was in fact made by Veillon, a French trade unionist<sup>(28)</sup>, in his report on benefits to the 1962 Conference:<sup>(29)</sup> upward harmonisation would, he hoped, be complete by 1970. Veillon's report gave rise to a vehement reaction on the part of the employers<sup>(30)</sup>. It was rightly pointed out that such a demand is utopian, because both the enormous increase in social expenditure which it would involve<sup>(31)</sup> and the effect which it would have on income differentials and the position of the individual in society would be incompatible with the market economy<sup>(32)</sup>.



A less extreme form of this approach has been of greater influence. Instead of demanding total upward alignment, one can approach the matter more selectively, by singling out small differences which seem unjustifiable and demanding harmonisation of those particular provisions, either to conform to the highest existing standard or to some new standard which takes account of the experience or trends in the various countries. For example, if maternity allowances are paid during a period of twenty-one weeks in one country and only twelve weeks in another, one can argue that upward harmonisation requires that they should be paid for twenty-one weeks in all the member states; or if unemployment benefit is paid from the fourth day of unemployment in most countries, but from the first day in one, upward harmonisation would require that it should be paid from the first day in all countries. By confronting the provisions of the various systems, inadequacies will be shown up which could be eliminated one by one by means of progressive harmonisation. This approach was very much favoured by both trade unions and the Commission. It is prominent in many of the papers by unionists at the 1962 Conference and elsewhere<sup>(33)</sup>, and it inspired much of the early work of the Commission, including its recommendations on industrial diseases and its proposed recommendations on maternity and invalidity.

The third form adopted by the social progress theory is that it is the Commission's task to foster social progress by the cross-fertilisation of ideas. According to this view, closer contact between the member states in the social domain would mean that in each country the government, the "social partners" and others would be



made aware of solutions adopted in other countries to meet problems common to all the member states. This knowledge would either lead governments to adopt the most rational solution, or, failing that - and this point is less often made, though it seems to me more important - would provide the trade unions and other groups with a lever with which they could press for reforms. The emphasis here is still on harmonisation seen as the upward harmonisation of benefits, and the process is seen as being primarily one of ~~the~~ learning. Thus, in the discussion of the social effects of Britain's entry, the question has often been posed in terms of: "what do we have to offer, what lessons do we have to learn?"<sup>(34)</sup>.

One thing that these three forms of the argument have in common is that in reality they have not very much to do with harmonisation. The demands for total or partial alignment are not really concerned with alignment: they are surely only a novel form for presenting the real demand of the unionists: that social benefits should be raised<sup>(35)</sup>. It may be desirable that social security benefits should be raised throughout Europe, but it is very hard to think of any purely social reason (i.e. a reason affecting the material welfare of the individual recipient) why benefits should be the same in all the member states. For the unions and other groups who put forward these arguments, the EEC is merely providing a new and stronger frame of reference by which to measure their own country's standards, a new measuring rod with which to beat their own governments. Thus, for example, the purpose behind the late Professor Titmuss's article on the harmonisation of social security in the EEC<sup>(36)</sup>, in which he argues that the Government's pension proposals would, by increasing the role of private insurance, bring the British system further out of line with the

systems of the Six, is surely not to advance harmonisation but to castigate the Government. Similarly, when the TUC argued that British benefits should be raised to the level of the other member states when Britain acceded to the EEC<sup>(37)</sup>, the aim was certainly not to further European integration. In a sense, harmonisation would be self-defeating from this point of view: if the benefits in all the member states were the same, one country could no longer "learn" anything from the others.

I do not, of course, wish to reject the social progress approach, merely to suggest that its primary function was to advance the national claims of the trade unions and like-minded pressure groups. But why did the Commission associate itself with this approach, in spite, as we shall see, of the opposition of employers and member states?

The answer no doubt lies, in part at least, in the fact that the Commission had a broader concept of European integration than that which, according to Mr. Veldkamp<sup>(38)</sup>, inspired the Treaty-makers. It was felt that citizens of the EEC should, if it was to become a real "Community", enjoy more or less the same social standards<sup>(39)</sup>. More important, they should actually feel that they are citizens of the one Community:

"What is required is that countries which have linked their destinies ... should reduce their differences as much as possible, and that their peoples should feel part of the same Community ... People must feel that their social levels are equivalent"<sup>(40)</sup>.

And not only should the Dutchman feel that he shares something with the Frenchman, etc., but he should be aware that their common fortune is attributable to the Community. If the Community is to be a success and win the allegiance of the people of Europe, it must be seen not just as an economic club but as the bearer of social improvements<sup>(41)</sup>. Thus the social progress approach corresponded also to the political interests of the Commission.

It should now be obvious why the course adopted by the Commission in the early '60s encountered strong opposition from both employers' associations and the member states. The employers objected because the Commission seemed to favour trade union demands and any upward harmonisation of benefits would increase the charges they had to bear. The social security institutions, particularly in FR Germany, objected because they felt that their autonomy was threatened by the calls for structural harmonisation<sup>(42)</sup>. The governments of the member states objected because, in addition, they felt that the Commission was trying to usurp their powers and the allegiance of their citizens<sup>(43)</sup>. Whereas the original idea had been that social security would be a concern of the Community only in so far as it had undesirable international effects, the Commission was now trying to set certain standards within the member states.

The coolness of the member states towards the Commission's policy was shown by their refusal to participate in the 1962 European Social Security Conference<sup>(44)</sup> other than as observers. This Conference, organised by the executives of the three Communities<sup>(45)</sup> to promote discussion of the harmonisation of social security, was supposed to bring together representatives of the governments, of the trade unions and employers' associations, and a number of "independent experts". In the event, only the last three groups



took an active part. It is striking that at this conference (and in the debate which followed), it is the union representatives who are the main protagonists of harmonisation, while the employers insist that the removal of obstacles to competition can be the only ground for harmonisation and that the whole question must be approached with very great caution<sup>(46)</sup>. It is clear that the shift in emphasis from the competition to the social argument marks a shift from the employers' to the unions' point of view.

The tension between the Commission and the Council came to a head in the period between 1964 and 1966<sup>(47)</sup>. At the meeting of the Council on 21st April, 1964, the six ministers responsible for social affairs stated unanimously that social security fell within the jurisdiction of the governments only, and that the institutions of the European Communities had therefore no competence in this area<sup>(48)</sup>. Thereafter, there was a complete breakdown in communication between the Commission and the Member States. The governments refused to co-operate with the Commission's work under Article 118 and, for two years before the meeting of December 1966, the ministers of social affairs refused to meet in the Council<sup>(49)</sup>, despite the bitter complaints of the Parliament which even threatened to have recourse to Article 175 of the Treaty to compel the Council to take certain decisions<sup>(50)</sup>. Whereas originally only the Federal Republic was strongly opposed to the expansive social policy of the Commission, it seems that by 1966 she had been joined in her opposition by all the member states except Italy, which had most to gain (if not in this, then in other areas) from an expansive social policy<sup>(51)</sup>. The member states made three demands of the Commission: that it should not undertake any study without the prior authorisation of the Council;

that it should consult the "social partners" only on the subject-matter of the authorised studies and only within the organs provided for that purpose either by the Treaty itself (i.e. the Economic and Social Council) or by decision of the Council<sup>(52)</sup>; and that it should not make any recommendation without first obtaining the unanimous agreement of the Council<sup>(53)</sup>. The Commission was not at first prepared to accept these conditions.

But by 1966 it was clear that the Commission's social policy had failed and that something would have to be done. The Commission had been chastened not only by the continued opposition of the Council to its policy; but also by the French boycott of the Council from mid-1965 until the Luxembourg agreement of January 1966, which had been occasioned in part by the general expansive policy of the Commission, in the social as in other domains<sup>(54)</sup>.

A compromise was reached as a result of the work of Mr. Veldkamp, Dutch Minister of Social Affairs at the time<sup>(55)</sup>. The Dutch held the chairmanship of the Council during the second half of 1966, and Veldkamp, who felt that the demands of some of the member states went too far, presented a conciliatory memorandum, the main proposal of which was a sort of "gentlemen's agreement" under which the Commission would be disposed to concentrate its efforts under Article 118 on those subjects which it knew to be of interest to the member states; in return, the member states would, of course, co-operate with the Commission in its work<sup>(56)</sup>.

Veldkamp succeeded in bringing the ministers of social affairs together on 19th December 1966, and an agreement was reached on the basis he had suggested. At this meeting, it was decided that the Commission should concentrate its attention on three areas:



- an examination of the opportunity, necessity and possibility of harmonising the notions and definitions used in the different social (and particularly social security) systems;
- a study of the costs of social security and the manner in which the burden is divided between the workers, the employers and the State;
- an examination of the possibility for States to ratify social agreements concluded within the framework of international organisations.

Veldkamp claimed that both the "economic" and the "social" approaches to harmonisation were represented in this compromise; the Study of the costs reflected the wishes of those who saw harmonisation as an economic requirement, the other two points corresponded to the "social progress" approach<sup>(57)</sup>. Subsequent developments indicate, however, that it is the economic side of the Commission's work which is more significant.

It should be noted that the idea of partial upward alignment (i.e. the upward alignment of particular benefits)<sup>(58)</sup> is abandoned. The proposed recommendation on the protection of maternity, which the Commission had presented to the Council before the meeting, has never been made - one of the governments thought that it would cost too much<sup>(59)</sup>. Veldkamp makes the distinction between "harmonisation matérielle" and "harmonisation des principes". By the former term he refers to the harmonisation of the benefits themselves, particularly of their amount and coverage. Such harmonisation should not, he argues, be imposed from outside, for benefits must depend on national, social and economic priorities. Apart





from the exchange of information on these matters, "harmonisation matérielle" should be left to the functioning of the Common Market. This is, of course, the same as what employers' associations and governments had been arguing all along.

By "harmonisation des principes", Veldkamp refers to the harmonisation of legal principles and definitions, of procedural rules, etc. He feels that here there is a sphere in which "technico-juridical" harmonisation can be usefully pursued without meeting financial, economic or political barriers. Hence the first of the three areas of study mentioned above: the harmonisation of definitions. In fact this approach has brought no results. The only action along these lines appears to have been the proposal for a recommendation, submitted to the Council by the Commission in 1968, on a Community definition of the state of invalidity. The proposal, on which work was started after the 1962 Conference, has had no more success than the proposed maternity recommendation<sup>(60)</sup>.

The examination of the problems of ratifying international conventions - the second "social" area of the three areas specified at the 1966 meeting - led to a report by the Commission in 1968 on important conventions (including ILO convention No. 102, the European Social Charter and the European Social Security Code) and the possibilities and difficulties of ratifying them for the member states. This work, modest though it is, appears to have been fairly successful in persuading states to ratify these conventions<sup>(61)</sup>.

Friction between the Council and Commission continued even after the meeting of December 1966 though on a lesser scale<sup>(62)</sup>, but the Veldkamp "compromise" succeeded in starting the dialogue between Commission and member states again. It is clear, however, that, from the institutional point of view, the clash of views between

Council and Commission had ended, inevitably, in the Council's favour<sup>(63)</sup>, in so far as:

- (1) The Commission's programme of studies and action were to be determined by the Council rather than by the Commission: after 1966, the initiative in the field of social policy passed from the Commission to the Council;
- (2) Recommendations are not in practice issued unless the Council has given its unanimous approval<sup>(64)</sup>;
- (3) Contacts between the Commission and the trade unions and employers' organisations were restricted.
- (4) The "independent experts" consulted by the Commission were in future to be chosen by the Council<sup>(65)</sup>.

But the outcome of the clash marks not only an institutional defeat for the Commission, it also marks the defeat of the "harmonisation for social progress" approach. As we shall see, the Commission's work after 1966 has been increasingly economic in nature.

It was, no doubt, almost inevitable that the social approach should fail, not only because of the general deterioration of relations between Council and Commission during this period, but because it was too idealist in its conception. Changes in social security systems cost a lot of money and they do not normally come about simply because a Minister or his civil servants suddenly perceive the most just or the most rational solution. Rather, they are primarily the result of economic pressures, which may come from either within or outside the country, or of social pressures, which surely must come primarily from within



the country. Social arguments arising from a comparison with other countries may be very attractive, but they are unlikely to be of any force unless supported by strong pressure from within the country. As one civil servant in the DHSS put it recently, "it's all very well and noble for the EEC and other international organisations to ask us to raise our standards, but where is the money to come from?"<sup>(66)</sup>.

#### The debate since 1966

It is, of course, a stark simplification to divide the discussion on Articles 117, 118 into "before 1966" and "since 1966". The rigid distinctions I make did not exist in reality. The competition and social progress arguments continue to be advanced after 1966, and the new policy which now emerges had already been emerging for some time before the meeting in December 1966. Yet it is clear that there is a change in the direction of the Commission's social policy, particularly with regard to social security, in the late mid-'60s, and that the meeting of 19th December 1966 is the most significant event in this process of change, and therefore the most convenient way of dating the change<sup>(67)</sup>. Further, the dominant feature which characterises the debate before this date is the clash between competition and social arguments, between unions and employers' organisations, between Commission and Council; the dominant feature of the debate after 1966 is the new technically rational, macro-economic approach.

Before examining the new policy and its significance, it is as well to remind oneself of the main thrust of the argument so far and the questions it raises. The main argument is that, behind the obvious clash between Commission and Council, there lay another



conflict, that between trade unions and employers or, more accurately, a conflict between those who wanted to make use of harmonisation as a means of raising social security benefits and those who were opposed to this. If this is correct, then the question arises whether the fact that the clash between Commission and Council resulted in the subordination of the Commission to the wishes of the Council<sup>(68)</sup> means that the new policy will reflect the interests of those opposed to using harmonisation as a means of raising benefits, i.e. will the new policy reflect the interests of the employers, or will it be purely "neutral"? If the discussion before 1966 was in reality a struggle between unions and employers, who won? This is the first question to ask in assessing the new policy. A second question which arises from the discussion so far is: why did the tone of the debate change in 1966: was it merely the result of the new relationship between Council and Commission which was established after the Luxembourg agreement of January 1966, or should it also be seen in relation to the changing function of social security in the economic policy of the member States? Is it sufficient to see the new policy simply as the outcome of a clash between institutions, or can we relate it to more general social and economic changes at this time? Thirdly, if the arguments presented so far in favour of harmonisation were so unconvincing, why is social security still a matter of serious Community concern? These are the three main questions we will try to answer in the analysis which follows.

The debate before 1966 is seen often as a conflict between the "economic" and the "social" concept of harmonisation. In these terms, the new policy marks a return to the economic approach. But the emphasis is not so much on the individual producer and his competitive position, but on the welfare of the "economy" as a whole. The approach is now a deliberate macro-economic one, the principal concern being the

position of social security in the economy and its impact on economic policy and development. Thus, the Commission has produced a number of studies on the financing and on the economic impact of social security, and its main task in this area at the moment is the elaboration of a social budget, i.e. a medium-term forecast of the financial development of the social security schemes of the member States<sup>(69)</sup>.

Whereas the original competition argument saw social security as something negative, of relevance to integration only in so far as it was a hindrance to be removed in order to clear the path of free competition, the new approach is far more Keynesian: social security is of interest because it can play an important part in economic policy and because economic policy is important for the EEC. Naturally, the economic importance of social security was appreciated long before 1966. At the conclusion of the Treaty of Rome, it was declared that social policy came within the framework of economic policy for the purposes of Article 145, which gives the Council the task of ensuring the co-ordination of the general economic policies of the member States<sup>(70)</sup>. But, for various reasons (the growing acceptance of economic planning at national and at Community level, the growth of social security expenditure, etc.)<sup>(71)</sup>, it was not until the mid-1960s that serious attention was devoted to the problem<sup>(72)</sup>.

The macro-economic approach is already implicit in the rejection of the social approach to harmonisation. Against the demands, especially the more extreme demands, of the trade unionists at the 1962 Conference, the employers and those who supported their cause maintained that such demands did not make economic sense, that the economy could not possibly stand the greatly increased expenditure which would be involved. This is especially so at the moment (the argument continues), when social



security costs are already rising "spontaneously" at a dangerous rate, far more quickly than the national income of the various countries. If too much money is spent on social security benefits, this will bring inflation and monetary instability, damage foreign trade and lead to a recession<sup>(73)</sup>; it could also destroy wage differentials and the incentive system upon which the market economy is based<sup>(74)</sup>. The main problem of Community concern should be not the inadequacy of benefits - which, after all, is the affair of the individual states - but the problem of rapidly rising costs, which threaten to provoke, indeed are already provoking, disturbances in the economy of the Community<sup>(75)</sup>. The Community harmonisation policy should concentrate, not on upward alignment of benefits, which is economically impossible and counterproductive, but on curbing the rise of social security costs in the Community.

Here, the notion of harmonisation is being harnessed to arguments which favour restricting the growth in social security costs (and therefore benefits). This is the complete opposite of the view advocated at the time by the Commission and the trade unions, for their argument linked harmonisation with raising social security benefits (and therefore costs).

The argument linking harmonisation with curbing the growth of costs is put forward frequently, especially in the few years following the 1962 Conference. Thus, Frisch, in an article written in 1965 with the interesting title, "Das System der sozialen Sicherung in Frankreich - Vorbild für die Harmonisierung der Sozialpolitik in der EWG?", describes the French system and commends it - or, to be more accurate, the French employers' suggestion for the reform of the system - as a possible model for harmonisation. He finishes up:



"Jedenfalls sollte man mit allen Mitteln versuchen, die soziale Sicherung einigermaßen in Schranken zu halten, damit sie nicht die Gesellschaftsordnung einen auf die Dauer gewiss nicht wünschenswerten kollektivistischen Stempel aufdrückt"<sup>(76)</sup>.

Lell, in a book devoted to the topic, "Die soziale Harmonisierung in der EWG", explains that the trade unionists' demands of 1962 would lead to economic crisis and social impoverishment and argues that harmonisation should take the form of the creation of a minimal social insurance scheme, which would be supplemented by a system of assistance for those in real need, the rest being left to private initiative. One of the advantages of this scheme would be that it would reduce the costs of social security<sup>(77)</sup>.

That the problem is seen in terms of a struggle between the forces which want the system of social protection to grow more quickly and those forces which favour their restriction, emerges most clearly from an article by Meenzen with the title, "Sind Nivellierung und Superbürokratie europäisches Schicksal?"<sup>(78)</sup>. He vigorously condemns the Commission's policy and the unions' demands, and calls for a rallying of the opposing forces. He concludes that for a proper social policy it is necessary:

"nicht nur in der Bundesrepublik, sondern in ganz Westeuropa jene Kräfte zu mobilisieren, die es mit jenen halten, die nicht eine Ausdehnung, sondern eine Eindämmung der Sozialversicherung für zeitgemäss erachten"<sup>(79)</sup>.

This rallying-cry is taken up in an article in 1964<sup>(80)</sup> by Meinhold, the most sophisticated and eloquent proponent of the macro-economic approach<sup>(81)</sup>. After pointing out that upward alignment as demanded by the unions is not economically feasible, especially in view of the tendency of social security costs to rise more rapidly than the national income, he points too to the fact that in all the countries concerned there are forces opposed to this tendency:

"Wir brauchen jedoch dabei nicht zu übersehen, dass es auch entgegengerichtete Tendenzen geben kann, es gibt bekanntlich Kräfte, und zwar - wenn in verschiedenen Formen - über alle Parteien und Ländergrenzen hinweg, die darauf abzielen, bei steigendem Wohlstand die Zahl der von der Allgemeinheit zu deckenden Risiken oder mindestens den Anteil, in dem sie gedeckt werden, zu reduzieren und damit das Sozialbudget zu entlasten"<sup>(82)</sup>.

The more effective these forces are, the more economic room there will be for harmonisation:

"der sehr enge Spielraum, der einer Harmonisierung der Sozialsysteme im Sinne ihrer Annäherung von der Verwendung des Sozialprodukts her gegeben ist, kann in eben dem Masse ausgeweitet, das Verfahren einer solchen Harmonisierung also beschleunigt werden, in dem es gelingt, in der nationalen Eigendynamik Kräfte zu verstärken, die deren Tendenz nach oben abschwächen oder gar aufheben"<sup>(83)</sup>.



Whereas Meenzen's rallying call seemed little more than a crude call to battle in the defence of individual freedom, Meinhold presents the rallying of the same forces as the only course consistent with economic rationality. But both urge the same point: the first concern of Community social security policy should be with the problem of rising costs.

Has this point of view been adopted by the Commission? If so, then it means, not just the development, but the complete reversal of its earlier policy. Is this what the new socio-economic orientation is really about? The tentative answer to this important question must at this stage be: yes. The emerging perception of the rising costs of social security as the major problem to be dealt with, rather than the inadequacy of benefits, is not something that is self-evident, but marks the adoption of a viewpoint much akin to that advanced by Meinhold in 1964.

The argument is at first sight very obvious: all the countries in the EEC now spend about 20% of their national income on social security, and the proportion is rising rapidly. This is because of rising medical costs, because the demographic structure, together with such factors as rises in school leaving age, means that there are more people receiving benefits, and because there is a natural tendency for social legislation to be improved as new inadequacies appear and as elections approach. It is felt that this rapid rise cannot be allowed to continue, that the "economy" demands that the rise in costs be kept under control.

But why is 20% such a crucial figure? Why was it not decided when the proportion of national income spent was 10% or 15% that the trend could not be allowed to continue? Or rather, is it not the case that, from the start of social insurance, there have always been those



who argued that a rise in social expenditure could not be borne by the economy? Why is it then that first the governments of the member states and then the Commission come to see this as a major problem in the early and mid-1960s?

The answer has little to do with the magic figure of 20%: the mere citing of such a figure tells us little about the social or economic effects of the expenditure<sup>(84)</sup>. The attempt to curb social security can only be understood in relation to the economic difficulties faced by the member States at this time. The changes in the Commission's policy were preceded by national concern over the rapid rise in costs.

There seems to have been a strong movement to limit social security in nearly all the countries of the Common Market<sup>(85)</sup> in the early 1960s. It was argued that the affluent society had made such a high degree of social protection unnecessary, that it was time to ask whether the "economic and psychological limit"<sup>(86)</sup> of the institution of social security had been reached. The fact that the Federal Republic had a greater measure of social redistribution than any comparable country failed to arouse the enthusiasm of the CDU in 1965, for it was impossible to ignore the "Feststellung der internationalen Wissenschaft ... dass die Umverteilung von einem ganz bestimmten Punkt an fragwürdig wird"<sup>(87)</sup>.

Yet, for all this talk of the "affluent society", it was becoming increasingly clear that there was still a great deal of poverty in Germany, as in the other countries of Europe. The social inquiry (Sozialenquete) which had been commissioned by the government and which published its report in 1966, discovered that 14.3% of Germany's pensioners had a net income of less than 150DM per month,

at a time when the existence minimum set by the federal assistance law (Bundessozialhilfegesetz) had been fixed at 203DM per month. The average pension received under the workers' pension scheme (Arbeiterrentenversicherung) - under which 6 million people received pensions - was slightly below the assistance level<sup>(88)</sup>. An inquiry in 1965<sup>(89)</sup> found that in Stuttgart, said to be the richest city in Germany, almost 5000 children in large families had no bed of their own because the flats in which they lived were too small to take another bed<sup>(90)</sup>. In order to put the arguments on the limits of social security and social redistribution in perspective, it is worth insisting on the fact that poverty is a continuing problem in all the countries of Europe. In France, it has been calculated that, with luck, the income of more than two million pensioners may have actually reached half the minimum wage, "c'est à dire la moitié d'un minimum tenu, par hypothèse, pour incompressible" by the end of the period covered by the Vith Plan (1975)<sup>(91)</sup>. In Britain there are about four million people living on supplementary benefit at any given time, a figure which is constantly rising.

This being so, why is it urged that social redistribution must not be allowed to go too far, that the main social needs have been satisfied? The answer can be found only by seeing the attempt to curb social security in relation to the general attempt to restrict labour costs by political means, which in turn must be understood as a reaction to the economic situation of the early and mid-60s.

This was a period of difficulty for the economies of most of the member states; the long period of rapid growth enjoyed since the end of the War showed signs of coming to an end<sup>(92)</sup>. Profits were falling, a smaller share of the national income was going to owners of capital and the share going to wage and salary earners had risen. This latter share is known as the wage quota<sup>(93)</sup>. As usually measured, it includes



social security contributions (both employers' and employees') and income tax, so that it is likely to reflect any rise in social security expenditure<sup>(94)</sup>. The rise of the wage quota was most marked in Germany. Between 1950 and 1965, it rose from 59% to 65%<sup>(95)</sup> but the rise after 1960 was particularly rapid<sup>(96)</sup>. This was largely the result of the advent of full employment and the consequent strengthening of the position of labour on the market: it was not until 1960, when the number of vacancies exceeded the number of unemployed for the first time, i.e. when demand first exceeded supply, that the wage quota per worker employed began to rise<sup>(97)</sup>. Although Germany provides the most striking example of the difficulties which followed the advent of full employment, similar problems arose in France<sup>(98)</sup>, Italy<sup>(99)</sup>, Belgium<sup>(100)</sup> and the Netherlands<sup>(101)</sup>.

A rise in the wage quota, i.e. a rise in national labour costs, threatens investment and economic growth for two main reasons.

Firstly, it means a rise in the proportion of the national income going to those who will consume rather than invest it. For obvious reasons, wage earners are less likely to invest their money productively than are the large owners of capital<sup>(102)</sup>. This is particularly true of social security benefits, the aim of which is merely to satisfy the immediate needs of the recipients.

Secondly, it means that labour costs are rising more quickly than productivity and that, consequently, profits are being squeezed. This will make investment less attractive and could lead to a flight of capital to other countries<sup>(103)</sup> as the investors seek more profitable means of investing their capital. The consequence is unemployment, fall in the rate of growth, crisis<sup>(104)</sup>. This second and more important reason why a rise in the wage quota is a threat to investment and growth



is peculiar to capitalist economies, that is, to economies in which the power of investment is divided among a large number of autonomous bodies, each one impelled by the necessity, arising from competition, to invest profitably<sup>(105)</sup>. Because the central power of decision is limited, the question of social expenditure cannot be seen simply as a question of dividing resources between consumption and investment. It is necessary to make investment attractive, i.e. to make conditions such that the investor will find it more attractive (or at least as attractive) to invest in this rather than in another country. It is necessary, therefore, for governments to compete with other governments in attracting investments. In so far, therefore, as the Common Market has made capital movements easier, it will also have led to an intensification of this competition, i.e. to an increase in the pressure on individual governments to make investment attractive by keeping labour costs down<sup>(106)</sup>.

Hence, it is necessary, in the interests of the economy, to ensure that not too much of the national income is paid in wages and salaries (direct and indirect); in other words, it is necessary to restrict labour costs when they are rising too quickly, and thus to restore the margin for profits. This means indeed, as the "internationale Wissenschaft" has seen, that the redistribution of social wealth must not go too far, "dass die Umverteilung von einem ganz bestimmten Punkt an fragwürdig wird"<sup>(107)</sup>.

There are basically two ways of reducing the cost, i.e. the market price of labour. The traditional way is to increase the supply of labour relative to the demand. If there is no state intervention, this should come about anyway: the fall in investment will cause unemployment and redress the balance of supply and demand. Another way

of increasing the supply is to bring in foreign workers<sup>(108)</sup>. But there are limits to the number of foreign workers that can be imported, and, since the Second World War and especially (on the Continent) since 1960, any significant degree of unemployment has become politically unacceptable and will jeopardise the life of the government in power<sup>(109)</sup>. The second way of restricting labour costs is to try to depress the price below the market price, to influence the normal process of wage bargaining by persuasion or by law<sup>(110)</sup>. This is the function of an incomes policy<sup>(111)</sup>.

If an incomes policy is necessary, then so also is the control of indirect incomes, i.e. of social security benefits. These benefits form an important part of the income received by the worker, just as the costs form an important part of the labour costs of the employer. It has been calculated that benefits make up about 20% of the disposable income of households in all the original member states<sup>(112)</sup>. The employers' contributions alone constitute between 10% and 30% of the total mass of wages<sup>(113)</sup>. The importance of social security benefits and contributions is such that any attempt to control labour costs must aim at regulating not only direct wages but also the growth of social security costs and benefits. Just as these benefits may be seen as an indirect wage, so the attempt to control costs may be seen as an indirect wages policy<sup>(114)</sup>.

But there is an additional reason why social security costs should be restricted, particularly when there is a tight labour market. Those who argue that costs must be controlled, often speak not only of the "economic" but of the "psychological" limit to the increase in social protection, of the need to preserve individual freedom, responsibility, initiative<sup>(115)</sup> or (more honestly) incentive<sup>(116)</sup>. The reality behind



this fear for individual responsibility would seem to be an economic one: especially where there is a shortage of labour, it is important that social security benefits should not be developed to such an extent that workers would be able to withdraw themselves for long periods from the labour market and live on benefits.

Thus, we find similar developments in all the member states in the early 1960s. A squeeze on profits leads to the introduction of an incomes policy and an attempt to control the growth of social security. In the Federal Republic, the new economic situation arising from full employment and a rapidly rising wage quota compelled the gradual abandonment of the liberalism which had guided economic policy in the 1950's. However, the Government's policy was too slow in changing: the calls to curb social security expenditure were ineffective and the attempt to restrict wage increases by appeals ("Seelenmassage") was unsuccessful. The Governments' failure led to the recession of 1966-67 and its own downfall<sup>(117)</sup>. As part of its measure to restore stability to the economy (i.e. to restore profits, investment and growth), the new Government introduced a form of incomes policy (the "Konzertierte Aktion"), cut back on social security expenditure and set up a committee to work out a social budget, which would serve as an instrument for controlling social security costs<sup>(118)</sup>. In Italy too, partly as a result of the fall in unemployment, wages and the wage quota rose sharply between 1961 and 1963. Although this was followed by a period of deflation, profits were slow to recover. This, together with the Centre-Left government's unwillingness to accept increasing unemployment, led to the attempt to include a wage policy in the first economic development plan, covering the years 1966-1970.<sup>(119)</sup> The first medium-term



financial projections on the development of social security were also included in the Plan<sup>(120)</sup>. We find the same development in France: the share of wages and salaries increased substantially in the early 1960's, and the planners, wishing to arrest this trend, introduced an incomes policy within the context of the V Plan<sup>(121)</sup> (1966-70). Medium term social security planning was introduced at the same time<sup>(122)</sup>. The tale in the Benelux countries is very similar<sup>(123)</sup>.

After about 1960, therefore, there is a shift in policy on social security in all of the member states. There is a growing concern with the need to limit the rise in social security costs in the interests of the economy, with the need to plan these costs in relation to the needs of the economy. This is part of the general attempt to restrict and to plan labour costs, i.e. the incomes of employed persons.

This development is reflected in the new Community policy which has emerged since 1966. The Commission had referred to the problem of rising costs before this date<sup>(124)</sup> but it is only after this date that the problem is linked with the possibility of Community action in this field. It is in the Commission's report on the development of the social situation in the Community in 1966, published in August 1967 (eight months after the meeting of the Council of December 1966), that the link is first made clear. The rise in social security costs had, the report maintains, posed a double problem: that of ensuring that the growth in social expenditure was adapted to the possibilities of the national economies, and that of deciding what proportion of the national income should be spent on social security, in view of other social needs. The necessity is being increasingly felt, the report continues,

of defining a policy of social transfers co-ordinated with economic policy, and of re-thinking social policy in terms of present needs considered in a certain order of priority. But there is a danger that a purely national approach to these problems will lead to a false perspective<sup>(125)</sup>. Levi-Sandri, the member of the Commission responsible for social affairs at that time, laid particular stress on this point when he presented the report to the Parliament<sup>(126)</sup>.

The new orientation is shown even more clearly by Levi Sandri's<sup>(127)</sup> speech to the Parliament in March 1967. Although social advances already achieved must be safeguarded, he said, it might be necessary for the governments to take unpopular measures to restore financial equilibrium to the social security systems. However, the long term problem resulting from the rapid rise in expenditure could only be overcome by a system of comprehensive economic and social planning, for it is only within such a framework that restrictive measures affecting social security would be conceivable, because only thus could priority be given to all needs and legitimate interests safeguarded. Previously, social security had not really been seen properly in its economic context, but now:

"Mais maintenant, une analyse économique plus poussée s'impose pour déterminer les marges disponibles et la répartition optimale de la croissance du revenu national, notamment entre le présent et l'avenir, c'est-à-dire entre la consommation et les investissements<sup>(128)</sup> en ayant clairement conscience que ce choix conditionne l'avenir économique et social"<sup>(129)</sup>.

Finally, it is worth quoting from the Social Report for 1971, published in February 1972. The beginning of the chapter on social security makes explicit the link between the "affluent society"



argument and the European social budget which now constitutes the Commission's principal work in this area:

"Social security has now evolved beyond the stage of meeting the most vital needs and is reaching more and more social groups for whom it ensures better and better protection. Representing 20% of the Member States' national revenue, it reaches such heights of sophistication that the legitimacy of some of its applications is disputed, either on grounds of economic efficiency or even equity itself. It is therefore important for social progress from now on to be made by convergent efforts and to follow a definite programme. In this spirit, the Commission at the request of the Council has adopted, as one of its priorities, the creation of a European Social Budget"<sup>(130)</sup>

Thus the national attempts to curb the rise of social security costs and to control their future development within the framework of a plan are taken over at Community level. This is the substance of the Commission's new policy. That the control of social security costs is seen as an essential part of incomes policy is clear from the Commission's "Second Programme de Politique Economique à Moyen Terme"<sup>(131)</sup>. The section on "Politique des transferts sociaux" is part of the chapter on incomes policy. It is stressed here that:

"L'incidence économique et sociale des cotisations et prestations sociales est d'une extrême importance du point de vue de la politique des revenus"<sup>(132)</sup>

And again:



"... la politique des revenus ne peut se désintéresser du développement des prestations sociales et des modalités de leur financement<sup>(133)</sup>."

But the problem is so complex that it is put aside for further study within the framework of medium-term economic planning<sup>(134)</sup>.

The new policy can perhaps be seen as an indirect consequence of economic and political changes in the Federal Republic. It is from there that the principal opposition to the Commission's old policy came<sup>(135)</sup> and it is from there also that, after the change in government and in economic policy, the proposal for the establishment of a European social budget issued<sup>(136)</sup>. But to try to relate it too closely with a change of government in one country would be to miss the point. The change in the Commission's policy reflects a change in attitude towards social security expenditure which was taking place in all the member states, as a result of the economic developments of the early 1960s<sup>(137)</sup>.

The Commission's new policy is in effect a complete reversal (not merely a development) of its earlier policy. Whereas previously the prime concern of harmonisation was the raising of benefits, now the prime concern seems to be the restriction of costs. Should this be seen as a victory for the employers over the trade unions? Certainly, the Bund der Deutschen Arbeitgeber (BDA), the German employers' association, welcomed in 1966 the fact that the Commission was starting to pay attention to the macro-economic implications of social security<sup>(138)</sup>. If it is to be seen as a victory for the employers, is this not simply a victory for good sense over utopianism? Is it at all relevant to talk in terms of a struggle between unions and employers when considering the new policy? Is it not simply good sense to plan the development of

social security and to see how much the nation can afford? Before trying to answer these questions, I shall look more closely at the notion of social security planning, as it emerged in the member states and was adopted by the Community.

As we have seen, the concern caused by the rapid rise in costs led to more or less developed attempts in all the member states to control the development of social security systems within the framework of some sort of medium-term plan or forecast<sup>(139)</sup>. The function of such plans would seem to be three-fold: to restrict or control the rise in costs, to forecast costs and to provide a basis for calculations in relation to anti-cyclical or conjunctural policy.

The relation between curbing the rise in costs and social security planning or budgeting should already be clear. As Mackenroth put it in his very influential<sup>(140)</sup> article on "Die Reform der Sozialpolitik durch einen deutschen Sozialplan", a social plan would indicate "wo mit der Anerkennung von Ansprüchen Halt gemacht werden muss, weil die Wirtschaft das nicht mehr hergibt oder weil die Leistungseinkommen zu stark beschnitten werden müssten"<sup>(141)</sup>. That social security planning was introduced in order to restrict the growth of social security expenditure does not, of course, mean that it cannot, in certain circumstances be used by trade unions to press for higher expenditure<sup>(142)</sup>.

That a second function of these plans is simply to forecast the development of social security costs is equally obvious. This has a certain significance quite apart from the fact that it provides a basis for those seeking to restrict the growth of social security, and again this significance derives from the economic developments of the last quarter century. Increased technological complexity and the



accelerated rate of technological innovation has led to the need for large corporations to plan their investments on a medium or long term basis. One of the elements involved in calculating the profitability of investments is labour costs,<sup>(143)</sup> and one of the components of labour costs is social security charges<sup>(144)</sup>. For this reason it is desirable, in the interests of balanced economic growth, that the development of social security costs should be as predictable as possible.

The third function of social security planning is related to its possible use as an instrument of anti-cyclical and general economic policy. Again it is not too difficult to trace the growing importance<sup>(145)</sup> of this aspect to general economic developments. It is due, on the one hand, to the growing proportion of the national income spent on social security, and, on the other, to the greater importance which economic policy has assumed since about 1960. Since that time, the difficulties experienced by the economy and the political commitment to a relatively low rate of unemployment have led to more active government intervention in the economy. A further factor which contributes to the renewed interest in the economic impact of social security, is the fact that entry into the Common Market has meant for the member states that some of the traditional instruments of economic policy (for example, the manipulation of tariffs, taxes, exchange rates) have become less effective, more difficult or even impossible; and this process will accelerate as the Community progresses towards full economic and monetary union.

Social security is important for economic policy because it affects the economy in a number of ways. As a component of labour costs, it has an effect on prices (i.e. in so far as monetary and economic policy



allows employers to pass rises in labour costs on to prices)<sup>(146)</sup> and therefore on exports, the balance of payments and monetary stability<sup>(147)</sup>. We have seen already the effect it has, again as an element of labour costs, on investment and growth. The way in which schemes are financed, the extent to which funds are formed and the way in which such funds are invested also have an important bearing on general economic policy. The labour market may be strongly influenced by the structure of social security benefits, for example the age limits and conditions attached to family allowances and old age pensions. Again, depending on how it is structured, a social security scheme may have a favourable (i.e. weakening) or unfavourable effect on the cyclical fluctuations of the economy. Thus, benefits will have an anti-cyclical effect in so far as they offset a drop in wages and thus maintain consumption during a period of recession: this is particularly true of unemployment benefits. During a period of boom, the effect will also be anti-cyclical in so far as there is a reduction in the number of persons supported by social security benefits. This anti-cyclical effect is often annulled by the fact that benefits tend to rise as wages rise, and are in fact very often tied to wages<sup>(148)</sup>. Financing too, and the way in which funds are invested, may also have a more or less anti-cyclical influence. The Commission's study on the "Economic Impact of Social Security" comes to the conclusion that, generally, social security has a mainly pro-cyclical effect during lengthy boom periods, but a mainly anti-cyclical effect during periods of recession<sup>(149)</sup>. While pointing out the impossibility and undesirability of structuring social security schemes merely to meet the requirements of short-term economic policy, the study none the less emphasises "that the possibilities in this field have not yet been

exhausted"<sup>(150)</sup> and quotes with approval<sup>(151)</sup> the conclusion of the German Sozialenquete:

"Wo irgend möglich, sollte man versuchen, die Sozialpolitik innerhalb der von ihren Zielen gesetzten Grenzen auch konjunkturpolitisch zu orientieren"<sup>(152)</sup>

It is clear, then, that no active economic policy can afford to ignore the development of social security schemes, and that their economic significance extends beyond their importance in relation to incomes policy.

If these points explain the emergence of social security planning at the national level, they should also help us to understand why, after all these years, the question of a European social security policy is still a serious issue: it is still a serious issue because the control of the development of social security is essential for an effective economic policy; because, with the enmeshing of the national economies as a result of the creation of a common market, national economic policy has become more difficult, less effective and more susceptible to disturbances in other member states; and because, for this reason, the establishment of a common economic and monetary policy is one of the prime aims of the Community<sup>(153)</sup>. As this aim comes closer to fulfilment, so the establishment of some sort of Community policy on social security will become more and more necessary.

It is now possible to see the Commission's new approach in perspective. Since 1966, its work in this field has been mainly economic: it has published a number of interesting studies on the economic<sup>(154)</sup> and financial<sup>(155)</sup> aspects of social security. Since 1970 its main work<sup>(156)</sup> has been on the establishment of a European social budget which would give statistics on the receipts and expenditure of the



different social security schemes and would also contain medium-term forecasts based on existing legislation and taking into account a certain number of parameters--demographic developments, evolution of prices and wages, of the GNP etc.<sup>(157)</sup>. It can be seen that this interesting work, and the Commission's emphasis on the problem of the "limits of social security" and the need for a "European perspective", forms part of a more general reaction to the economic difficulties experienced by the member states since the early 1960s<sup>(158)</sup>.

The question remains whether this reaction, and particularly what I take to be its more important feature, the attempt to curb or "control" the rise in social security costs, is a necessary reaction. Whereas it is fairly clear in the early debate that each side is pressing its own interests, the new policy is advocated, not because it serves anyone's interests, but because it is the "rational" thing to do, the only way to satisfy the needs of the economy, and therefore the interests of everybody. Is this the case? In particular, has a limit to the growth of social security been reached?

The first point to be made is that a rise in social security costs does not necessarily lead to a rise in total labour costs. On the contrary, it seems that the rise in the proportion of the national income spent on social security has been accompanied by a corresponding fall in the proportion spent on direct wages. In other words, a rise in social security costs does not necessarily lead to a rise in the wage quota<sup>(159)</sup> (which, as we have seen, covers almost all the costs of social security)<sup>(160)</sup>. This has led Montes to quote one of his comrades to the effect that:

"la sécurité sociale a été avant tout une victoire  
de la classe ouvrière, sur elle-même"<sup>(161)</sup>.

There is thus no reason why a rise in social security expenditure should automatically lead to a fall in investment. Meinhold<sup>(162)</sup> argues that, with a constant wage quota, any significant increase in benefits would mean that taxes and/or contributions would have to be raised to such an extent that either the net income of the lowest paid would sink to an intolerable level, or the range of net incomes of employed persons would be so compressed that incentive, the differentiation of incomes according to achievement ("eine der grundlegenden Voraussetzungen unserer marktwirtschaftlichen Ordnung")<sup>(163)</sup> would be threatened. This seems to be exaggerated: it would take an enormous increase in social security expenditure before any major inroad was made into income differentials. Where the wage quota is constant, then, as long as there is admittedly widespread poverty among pensioners, there is no obvious reason why one should say that there is a limit to the proportion of total wages received by the worker in the form of social security benefits (i.e. as indirect, "deferred" or "socialised" wages).

Where, however, the situation on the labour market is such that the rise in social security costs contributes to a rise in the wage quota, as was the case in the early 1960s, then the question raised is a different one: is there a limit to social redistribution of income?. Is it economically necessary that the proportion of national income which goes to wage-and salary-earners should be limited to about 60% in order that the proportion going to the much smaller number of capital owners should be sufficient to make it attractive for them to invest their property? It seems that there is indeed some limit to social redistribution here: any significant rise in the wage quota is likely to cause a fall in the profits of private investors: this



would lead to a flight or withdrawal of capital, unemployment and crisis<sup>(164)</sup>. This is true, of course, only so long as the decision whether and where to invest is in the power of a large number of autonomous bodies, all impelled by the necessity to invest profitably.

This leads to the final point to be made here: the argument in favour of limiting labour costs is rational, the policy followed is economically necessary, only within the framework of the capitalist economic system. The limits to social redistribution mentioned above are not absolute limits, they are the limits only within a capitalist economy. That these limits exist in a society in which there is great material inequality, suggests that the argument establishing these limits is rational only within a framework of profound irrationality. It is within this context that the victory of the employers' "economic good sense" over the "utopian" demands of the trade unionists must be seen.

#### Effects and Implications

After the Paris Summit meeting of October 1972, a pre-election meeting<sup>(165)</sup> which, according to Ribas, marked "la relance de la politique sociale de la Communauté", it is still possible to discern both the social and the economic arguments for a European social security policy.

The social approach was urged at this meeting in particular by Herr Brandt<sup>(166)</sup>. With regard to social security he proposed the elaboration of basic principles which would serve as a basis for Community development and the gradual approximation of the social policies of the member States. The European policy he said, should guarantee similar levels of protection to the inhabitants of all the countries of the Community<sup>(167)</sup>. And yet, despite the fine words

spoken at the Paris summit, the experience of the last fifteen years suggests that social arguments have little to do with the creation of a European social policy. The political variation of the social approach, i.e. the argument that the Community must find a "human face" if it is to attract the support of the people, is more convincing; the more so as it is not put forward not only by the Commission but also by the governments, now more committed to European integration and conscious of its lack of popularity. Thus, M. Messmer, the French Prime Minister, speaking of the bad impression which people have of the Community, said that it was necessary to:

"démentir cette impression en assignant à la construction européenne des objectifs de nature à entraîner l'adhésion populaire".

This does not refer specifically to social security; topics such as regional policy, "participation" and "job enrichment" are possibly more suitable for changing the image of the Community. The Commission's current Social Action Programme contains only four proposals<sup>(168)</sup> which fall within our area: to continue work on the Social Budget and on the elaboration of social indicators and to promote the "dynamisation" of pensions and the extension of social security protection to the whole population. Of these four, only the last can be said to fall squarely within the "social" approach; and it is unlikely that that will have very much influence on the rate at which social security protection is extended. While not wanting to dismiss the social approach as entirely without influence, I would suggest that the economic argument for a European social policy remains the only serious one, and that only where there is some economic force behind the "social" proposal has the latter much chance of success.



Although it was the "social face" which was emphasised at the Paris summit, the economic approach was given more weight at the subsequent meeting in the Council of Ministers of Social Affairs, on 9th November 1972. The statement by M. Faure, the French Minister of Social Affairs, is particularly illuminating. He based the need for a European social policy on three points: the need to reconcile competitiveness and social progress, the growing internationalisation of centres of economic decision and, thirdly:

"L'union économique et monétaire ne pourra fonctionner sans une politique sociale, car l'évolution des revenus, des coûts salariaux, de l'ensemble des charges sociales des entreprises est au coeur du problème de la politique économique et monétaire comme de la politique sociale; elle commande largement l'évolution des prix ... Les dépenses de sécurité sociale atteignent désormais des montants proches de celui du Budget de l'Etat et exercent sur l'équilibre économique et monétaire une influence comparable à celle du Budget"<sup>(169)</sup>

The significance of this and the seriousness of the new approach to a European social policy is underlined by a complete volte-face on the member States' earlier bitter insistence on their sovereignty in matters of social policy:

"Dès lors qu'ils constituent une partie d'un marché unique, les Etats perdent en fait l'autonomie de leur politique sociale".<sup>(170)</sup>

The degree of harmonisation of social security policies so far achieved has been slight. As was seen in the last chapter, the Commission has succeeded in issuing only two recommendations, both of

them on industrial diseases. Yet, despite the limited scope and evident usefulness of these recommendations, their acceptance by the member States has been only gradual and partial<sup>(171)</sup>. These are the only formal acts which have been issued in relation to general social security policy.

Yet it may be - and often is<sup>(172)</sup> - argued that a certain degree of "harmonisation" has come about "spontaneously", i.e. as the result of a heightened awareness of common problems induced by contact within the framework of the Community and by the interesting studies published by the Commission, and as a result of the functioning of the Common Market. One example often quoted is the fact that many of the member States have taken measures in the last ten years to deal with the problems of handicapped children. Another example, quoted more frequently than any other, is the fact that in 1958 the proportion of the national incomes spent on social security varied between 12% and 18% in the various member States, whereas by 1968, the gap had been reduced from 6% to 3%, the proportions then varying between about 20% and 23%<sup>(173)</sup>.

Perhaps the weakness of these examples, particularly of the latter, illustrate best the limited effect which the EEC has so far had on the development of social security systems. Quite apart from the fact that, as a result of developments in the Netherlands, the proportions have begun to diverge again since 1968<sup>(174)</sup>, these figures tell us, as Mannoury points out<sup>(175)</sup>, no more about the social or economic effect of social security systems than the fact that a man spends a given percentage of his income by cheque tells us about the effects of his expenditure. Important divergences between the systems have remained or even increased. The most obvious example is that of the major reforms in the Dutch system during the late 1950s and the



1960s, reforms which made the Dutch system resemble British and Scandinavian models more than those of the other member States<sup>(176)</sup>. Nor is there any evidence that reform plans in any of the member States take much account of developments in other countries<sup>(177)</sup>.

Yet, harmonisation of social security policies is a serious topic. Firstly, there is some truth in the argument that the mere functioning of the Common Market will lead to some degree of "spontaneous" harmonisation. The development of social security is closely related to the development of the economy and of economic policy. The functioning of a Common Market will tend to create similar economic problems in all the member States and, in so far as social security systems develop in reaction to economic problems, similar trends may appear: hence, for example, the common concern in the 1960's with the rise in costs and the introduction of social planning. It would, however, be too much to expect that reactions to similar problems would always be the same.

Secondly - and this has been one of the main themes of this chapter - the establishment of a European social security policy will become more and more important as economic integration progresses. It is the establishment of a European policy which is necessary rather than the harmonisation of the various systems<sup>(178)</sup>. As Meinhold pointed out<sup>(179)</sup>, the harmonisation of benefits would create precisely those disturbances which a European policy should aim to avoid. What would be more important, in the interests of monetary stability, would be to harmonise the general rhythm of development of the various systems, i.e. in effect to maintain existing disparities. This is what M. Faure said in the Council meeting of 9th November 1972:

"... le but à atteindre n'est pas d'aboutir à l'uniformité sociale au sein de la CEE', mais d'avoir un rythme de progrès relativement comparable sous réserve de réduire un peu les distorsions excessives"<sup>(180)</sup>.

What would be the most important would be to be able to control at Community level the development of social security in the various parts of the Community, in order to co-ordinate that development with economic and monetary policy.

Beyond saying that, for economic reasons, there is an increasing need for the control of social security development to be established at Community level, it is very difficult to predict what the effects of a Community policy might be<sup>(181)</sup>. The mere fact that the most convincing arguments for the establishment of a European policy are economic arguments, does not, of course, mean that all sorts of social and political forces will not come into play in the formation of such a policy. Yet the discussion so far suggests that such a policy would be more concerned with the financial side of social security (funding, investment, contributions, structure, etc.) than with benefits, that its effects would be mainly restrictive, and that, although important, their immediate impact would be at a level far removed from public debate<sup>(182)</sup>.



## CHAPTER 4

## Chapter 4

### Harmonisation: Law and its Social Function

In the last two chapters we have surveyed in immediate and unrelated juxtaposition the legal and political arguments surrounding Articles 117 and 118 concerning the harmonisation of social security. The legal argument centred around the extent of the rights and duties of the Community institutions and of the member states under the provisions of the Treaty. The political argument focused on the question of the necessity and purpose of harmonisation. Behind the political debate, a clash of various interests could be discerned: on the first level, a clash between Commission and Council and, behind that again, a clash between trade unions and employers. This clash resulted in what amounted to a victory for the Council and for the employers and in the emergence of a new concept of harmonisation.

It is time now to attempt to relate these two debates, to relate the legal argument to the political argument, the conflict of legal opinion to the conflict of interests which we have outlined. What influence has the political conflict of interests had on the legal argument and on the legal interpretation of Articles 117 and 118? What influence has the legal form provided by these and the other articles of the Treaty had on the political conflict? The aim of this chapter is to look at each of these questions in turn.

That the particular content of Articles 117 and 118 is the outcome of a political dispute is universally recognised. Article 117 is, as Wohlfarth says, "eine typische Kompromissformel"<sup>(1)</sup>; it represents a compromise, not just between different concepts of the economic significance of social security, but between the material



interests of French and German producers<sup>(2)</sup>. This is hardly surprising: the creation of a law, the act of legislation, is always the outcome of a political debate, a political conflict. The interesting question is whether political conflict stops there, halts, so to speak, at the gates of the legal domain, leaving the arguments within that domain to the disinterested reasoning of lawyers. Does the act of legislation, in other words, create a sphere which is autonomous, or do the political conflicts which lie behind the act of legislation continue to permeate the interpretation of the measure enacted? Is it possible to distinguish a separate sphere of disinterested legal argument, or is the legal debate which we examined in chapter two merely a means of conducting, in a particular language, the political debate which was examined in chapter three? How is the legal argument that the Treaty provides no basis for Community action related to the political argument that such action is undesirable? And what link exists between the broad interpretation of Articles 117 and 118 and the views of those who, like the Commission and the trade unions, saw Community action in this area as being in their interest?

There are two levels on which a link can be seen between the legal argument and the political debate. Firstly, it is clear that groups, in putting forward their particular interests, often seek to strengthen their argument by giving it a legal justification. This is perhaps characteristic of the EEC: arguments often take place, not with reference to the "national interest" as in national political debate but with reference to the provisions or the aims of the Treaty. Such a tendency is certainly evident in the debate surrounding the harmonisation of social security. Broadly speaking, those who favoured harmonisation (principally the Commission and the trade unions) generally complemented this view with a broad inter-

pretation of Articles 117 and 118, while those who urged caution often bolstered their arguments with a narrow interpretation of the Treaty provisions.

Thus, the Commission consistently put forward the broad interpretation described in Chapter 2, maintaining that Articles 117 and 118 established a legal basis for a Community social policy, that Article 118 gave the Commission a right of initiative and that the member states were bound to co-operate with it, that harmonisation meant "social harmonisation", that other articles of the Treaty could be used in support of this objective, etc.<sup>(3)</sup>

The same interpretation, although less forcefully expressed, is used by many trade unionists in putting forward their claims. Thus Veillon, prefaces his controversial report to the European Conference on Social Security with some comments on "l'interprétation des textes"<sup>(4)</sup>. Cannella, in his co-report supporting the arguments of Veillon, also includes at the beginning of his report a section on the "fondement juridique de l'harmonisation sociale" which leads him to the conclusion that:

"l'harmonisation sociale ... possède un fondement juridique particulier qui est constitué par les dispositions combinées des articles 117 et 118 du Traité, puisque l'étroite collaboration entre les états membres dans le domaine social, prévue par l'article 118, n'a pas de sens si elle n'aboutit pas à l'objectif consistant à réaliser l'amélioration des conditions de vie et de travail de la main d'oeuvre grâce à l'harmonisation sociale"<sup>(5)</sup>

Kulakowski, pronouncing the closing discourse on behalf of the trade union delegates to the Conference presents a similar legal interpretation of Articles 117 and 118<sup>(6)</sup>.



The employers' organisations, not surprisingly, favour the more restrictive interpretation of the Treaty provisions. Seffen, the most explicit and persistent spokesman for the interests of the German employers<sup>(7)</sup>, continually attacks the broad interpretation of Articles 117 and 118 in his articles in the "Deutsche Versicherungszeitschrift". In his view, the member states retain exclusive competence in the area of social security, the harmonisation mentioned in Article 117 was intended to come about automatically and Articles 100 - 102 cannot be used to pursue a social policy: in short, the Treaty provides no legal basis for the harmonisation of social security:

"Die Sozialvorschriften des EWG-Vertrages sind also, entgegen der Meinung der EWG-Organe, durchaus nicht unpräzise, sondern vielmehr sehr präzise sogar in der Bergrenzung der EWG-Zuständigkeiten und Befugnisse"<sup>(8)</sup>

The governments<sup>(9)</sup>, more particularly the German government, adopted the same approach. At the European Conference, only two representatives of the governments of the member states spoke, both of them representatives of the German government, Knolle and Schwarz. Both interventions did little more than reiterate the narrow interpretation of Articles 117 and 118. It is worth recording the force with which Schwarz put forward this interpretation:

"Le traité instituant la CEE ne contient nulle part l'obligation de procéder à une harmonisation dans le domaine social, même pas dans le domaine de la sécurité sociale. Il part de l'hypothèse que les états qui s'unissent pour constituer une communauté économique restent autonomes. Dans ces conditions ... il n'existe,



d'après le Traité, aucune politique sociale "commune" ou "communautaire". Aussi la Commission de la CEE n'est-elle pas habilitée à formuler des propositions et le conseil de la CEE n'est-il pas autorisé à arrêter dans ce domaine des réglementations obligatoires<sup>(10)</sup>.

This interpretation of the Treaty is consistent with the refusal of the member states, in the two years preceding the compromise of 1966, to co-operate with the Commission in the social domain.

This small sample gives some indication of the way in which legal arguments concerning the interpretation of the Treaty provisions were used to strengthen political arguments and to weaken the arguments of the opponents. This is the first link between the legal arguments and the political interests involved: the different interests use different legal arguments to support their case. The peculiar authority of the legal arguments derives, in part at least, from the notion that there is a separate sphere of legal argument above the competing interests, an impartial tribunal of legal reasoning to which the parties appeal in support of their case. In the absence of judicial intervention - and there has never been any question of that in this context - such a "tribunal" must in practice be "la doctrine", a body of independent legal analysis.

In this particular case, however, the "doctrine" is very difficult to define. This is so because of the second level on which a link exists between the legal argument and the political conflict: interest groups not only make use of pre-existing legal arguments, they also create their own legal arguments to justify their political views. In these cases the legal interpretations are presumably devised to attain a particular end. This is certainly the view of Seffen, who,

particularly in his article entitled "Der Pragmatismus in der Rechtsauffassung der EWG-Organen zur Harmonisierung der Europäischen Sozialpolitik"<sup>(11)</sup>, accuses the Commission of concocting interpretations in order to give itself more room to pursue its expansionist policies. It is indeed one of Seffen's merits that he documents the Commission's inventiveness in this respect.

It may be argued, however, that there is an important distinction to be made here between the legal argument put forward by spokesmen for particular interests who adapt or invent the argument specifically to forward their own ends, and "la doctrine" *stricto sensu*, the body of legal analysis elaborated by lawyers with no direct interest in the outcome of the issue. In practice, however, the distinction is difficult to make in this particular area. The line between "la doctrine", the sphere of legal argument on the one hand, and the advancement of particular interests in legal form on the other, is extremely blurred. Interest groups, just as they use legal arguments to give weight to their claims, also express those arguments in legal text books. This is most strikingly exemplified by Groeben-Boekh and Quadri-Monaco-Trabucchi. It was seen in chapter two that these two works typify respectively the narrow and the broad interpretations of Articles 117 and 118. In neither of these books, however, did the editors write the sections on the social provisions of the Treaty. In the case of Groeben-Boekh, the author of the relevant section was Knolle, who, as we have just seen, presented the interpretation of the German government at the Conference of 1962; in the case of Quadri-Monaco-Trabucchi, the author was none other than Levi Sandri, at that time member of the Commission responsible for social affairs<sup>(12)</sup>. There is nothing



illegitimate in this, but it does illustrate the difficulty of drawing any clear line between legal argument and political debate, at least in this area.

That this is true in this particular area of law does not, of course, mean that it is true of all areas of law. The area being studied in this part of the thesis has several distinctive features: the relationship between political interests and legal conclusions is particularly transparent; the legal provisions are general, vague and relatively simple; the nature of the subject matter is such that few write about it apart from those actively involved in the political dispute. In such circumstances, it is hardly surprising that legal argument becomes merged with political conflict. Political positions are put forward in legal terms and legal arguments are almost invariably consciously linked with particular political positions. Although the legal argument derives much of its authority from its air of impartial neutrality, from its supposed origins in an extra-political sphere, this separate sphere tends, in fact, to vanish on close inspection.

As a corollary to this link between legal dispute and political conflict, one might expect that the legal interpretation of the disputed provision might be affected by the issue of the political conflict, even although no formal change has been made in the provision being interpreted. That this is so is suggested by one of the more recent legal commentaries, Kapteyn-Verloren van Themaat. In the opening paragraph of the section devoted to the social provisions of the Treaty, the authors point to the recent trend, "dat men de sociale politiek mede als integrerend bestanddeel van de economische politiek is gaan zien"<sup>(13)</sup>. And when they come to the detailed analysis of the second paragraph of Article 117, they draw the appropriate conclusions:



"Bij 'de in het verdrag bepaalde procedures' zal men o.i. mede kunnen en moeten denken aan de procedures tot coördinatie van de economische politiek, waarvan de basis is vastgelegd in de artikelen 105 en 145 en aan de andere bevoegdheden op economisch gebied ... Wij wezen er reeds op, dat de praktijk sinds enkele jaren in deze richting gaat<sup>(14)</sup>.

This is an interpretation which not only was not suggested by any legal commentator ten or more years ago, but which would have been surprising if it had been put forward in the early years of the Community, simply because no one then presented harmonisation of social security as an element in the co-ordination of economic policies.

Perhaps it is possible now to answer a little more precisely the question: what influence has the political conflict of interests had on the legal argument and on the legal interpretation of Articles 117 and 118? A number of propositions may be ventured. In the period before 1966 the conflict of political interests was accompanied by a sharp controversy concerning the legal interpretation of Articles 117 and 118. In the political debate, both sides made use of legal arguments to strengthen their case: the Commission and the trade unions put forward the "broad" interpretation of these articles, the employers and the governments insisted on the narrow interpretation. Very often the legal arguments were not only used but also developed or invented by the parties to the dispute in order to forward their own interests: this can be discerned not only where the interpretation is put forward in the name of, or in a polemical article on behalf of, one of the parties to the political dispute, but also in the case of at least

two of the legal commentaries on the EEC Treaty, those edited by Groeben-Boekh and by Quadri et al. Even where there is little obvious evidence of a subjective, conscious link between a particular political interest and a particular legal analysis, it can be observed that, objectively, a piece of legal analysis may serve the interests of a particular group. In the period since 1966, the easing of political conflict as a result of the Veldkamp compromise and the emergence of a new policy towards harmonisation has been reflected in an apparent slackening of legal controversy and in a new, more economic interpretation of certain provisions of Article 117.

It should now be quite clear how unsatisfactory it is to attempt, as was done in chapter two, to analyse Articles 117 and 118 and their interpretation by "la doctrine" in a formal and a-historical fashion. Not only does such an analysis conceal from view the conflict of social forces which has surrounded the interpretation and application of these articles and which provides the key to their development, but it is also unsatisfactory from the point of view of trying to reach some legal conclusion as to the meaning of these articles and the rights and obligations of the parties under them. Although it is the same legal provisions which are being interpreted in each case, it would be misleading simply to place, say, the arguments of Groeben-Boekh or of Quadri et al. beside those of Kapteyn-Verloren van Themaat. Because of the course taken by the political conflict, the arguments of Groeben-Boekh and Quadri et al (both of which date from the early years of the Community) do not have the same legal relevance any more: if one is looking for a legal basis for the sort of action that the Council is likely to take in relation to the harmonisation of social security, then probably



Kapteyn-Verloren van Themaat's reference to Articles 105 and 145 (and they might also have mentioned Article 103) would be the most fruitful line to follow.

So far we have looked only at the influence of the political conflict on the legal interpretation of the Treaty provisions. It is equally pertinent to ask what influence the legal provisions have had on the conflict of interests. In the last chapter the outcome of the conflict and the new trend in policy were explained as the result of the balance of political and economic forces: it does not seem that the legal provisions had very much influence on this outcome. It would be wrong, however, to conclude that the law had no influence on the political debate.

In the first place, it can be argued that it was the law which created the political conflict. True, the dispute between those who argued that the harmonisation of social security was a necessary part of the creation of a common market and those who argued that it was not existed before the conclusion of the Treaty of Rome, but it is very doubtful whether the dispute would have continued, at least in the acute and peculiar form which it took, if the compromise enshrined in Articles 117 and 118 had been omitted from the Treaty, or indeed if those articles had not been framed in such a loose and contradictory manner. Perhaps one can say that Articles 117 and 118 created the ring in which the fight could take place, and indeed almost pushed the fighters into that ring. These articles, together with the other provisions of the Treaty, determined the limits of the political conflict: the ambiguity of the provisions and legal ingenuity made these limits very vague, but, although the Commission might argue that the provisions of the Treaty should be changed, it could not, nevertheless, go beyond the limits set by the Treaty.



Secondly, the law influenced the style of the political conflict. As was seen above, the parties often couched their interests in legal language. If the metaphor used in the last paragraph is stretched, it might be said that the law not only creates the ring for the fighters but also fixes, in part, the rules according to which the fighters must fight. But there is little evidence that it had much effect on the result of the contest.

In conclusion, it may be said that the relationship between the legal interpretation of Articles 117 and 118 and the political conflict surrounding the notion of harmonisation is a two-way relationship. The political conflict had a very important influence on the form of the legal controversy, but the content of Articles 117 and 118, that which existed for interpretation, had a not insignificant effect on the political conflict. It will not do to reduce the legal interpretations to a mere reflection of the political debate, without any autonomous significance: the legal arguments could be manipulated for political ends, but only within certain limits.

What has been said about the relationship between the interpretation of Articles 117 and 118 and the political conflict which has surrounded them is not, of course, necessarily true of all legal provisions. These articles are particularly vague and open-ended in their nature, one might say particularly "political". This must be borne in mind when we come to consider the abstruse legal technicalities of some of the provisions concerning the co-ordination of social security schemes to cover migrant workers.

Part 2

Co-ordination

## CHAPTER 5



## CHAPTER 5

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## Chapter 5

### Co-ordination Law

The law relating to the co-ordination of social security in the EEC differs in almost every respect from the law relating to harmonisation. The provisions of Articles 117 and 118 do not form a closed legal system: their interpretation and application cannot be separated from the political and economic issues which they raise. There is, as we have seen, a fairly direct link between their interpretation and the conflict of ideas and interests which surround them. Moreover, they do not give rise to any individual rights, they have not formed the basis of any binding legal acts and they have not been the object of any legal decision. In terms of strictly legal analysis, they do not offer a great deal of interest.

A very different picture is presented by the law on the co-ordination of social security. This is the true realm of the specialist lawyer<sup>(1)</sup>: hundreds of pages of regulations, hundreds of court decisions, a large and complex domain of rights and obligations, not related in any obvious or direct way to political considerations. Whereas the attempt to analyse Articles 117 and 118 in purely legal terms is artificial, since one is constantly confronted by questions concerning the purpose of harmonisation or the economic effect of social security, a legal analysis of Article 51 and the regulations made thereunder is essential if one is to understand their development.

The analysis of the legal provisions of Article 51 and its regulations presents a certain interest for a number of reasons. These regulations (especially Regulation No. 3 and Regulation No. 1408/71 which has now replaced Regulation No. 3) probably

directly affect more individuals than any other Community regulation. About two million people benefit each year from their application<sup>(2)</sup>, and this involves the annual transfer of hundreds of millions of dollars<sup>(3)</sup>. Although these regulations have not attracted a great deal of attention from legal commentators, they have nevertheless been one of the main sources of litigation in Community law.

Regulation No. 3 has been the subject of no fewer than fifty decisions by the European Court of Justice and of well over two hundred decisions by national courts.

In order to understand the principles of Regulation No. 3 and Regulation No. 1408/71 and the difficulties of interpretation which have arisen, it is essential to look first at the difficulties which migrants are likely to encounter in relation to social security, and at the way in which these problems have traditionally been solved by international treaty. The first section of the chapter will therefore sketch the problems and principles of the international law relating to the co-ordination of social security. The second section will examine the development of these principles by Regulation No. 3, and this will be followed by a section devoted to an analysis of the courts' interpretation of Regulation No. 3. A fourth section will deal with the revision of Regulation No. 3 and the changes introduced by Regulation No. 1408/71.



1. International Law relating to the Co-ordination of Social Security Systems

A. The Problems of providing Social Security for Migrant Workers

Not surprisingly, the problem of providing social security for migrant workers is one which has grown with social security itself since the end of the last century.

It is not so much the cases of conscious discrimination against foreigners which create these problems and make their solution difficult. More often the difficulties arise from the fact that the social security schemes have been devised primarily for the large majority of people sensible enough to stay at home and work in their own country, so that the migrant is, in a sense, a deviant who does not easily fit into the pattern. Thus, a migrant coming to work in France, say, will find not only that he is not admitted to certain social security benefits, such as the 'allocation aux vieux travailleurs salariés' (AVTS), the 'allocation temporaire aux vieux' or the 'allocation de maternité', all of which require that the beneficiary (or her child in the last case) be of French nationality<sup>(4)</sup>; he will also find himself faced by restrictions which, although not based on nationality, are, by their nature, more likely to hurt the migrant than the non-migrant. Family benefits, for example, are not payable, as a rule, in respect of children not resident in France. If the migrant becomes disabled and receives a disablement benefit, he will not be able to return home without forfeiting it, for such benefits may not be served outside France. He will receive no old-age pension unless he works in France for fifteen years; and even if he does that and is given a pension, he will find that if he returns to his native land, then, although he will not lose his pension, he will lose the



free medical care which he would have received in France as part of his old-age benefit<sup>(5)</sup>.

These are only some examples of the difficulties and restrictions encountered by migrants under the law of one country. It need hardly be emphasised that the loss of a pension or a family allowance could bring serious hardship to the person concerned in these days of weakened family ties, sharply rising medical costs and indeed costs of living in general, nor that a migrant, living away from his family and probably earning low wages will be particularly susceptible to such hardship.

If we look more closely at the legal problems involved in assuring the provision of social security to migrant workers, we find that they are of four main kinds. When a migrant moves from one country to another, he may find himself confronted by nationality restrictions; he may find that the social security benefits to which he has a right may not be served in the new country, i.e. that there is a problem of the conservation of acquired rights; thirdly, he may find that he loses the rights which he had not yet acquired but was in the process of acquiring; and fourthly, there may be difficulty in determining the country whose legislation governs the various rights and duties of the migrant. Let us look at each of these problems in turn, for it is primarily to these problems that social security treaties and Regulations Nos. 3 and 1408/71 of the EEC aim to give a solution.

(1) Nationality restrictions. It is the exception rather than the rule that social security benefits should be subject to nationality restrictions<sup>(6)</sup>. That this is so is due largely, no doubt, to the

notion of insurance which still lies at the bottom of most social security: if a person pays his contributions, then he should receive a benefit in return, commercial contracts know no nationalistic sentiments. It is mostly in cases where social security has been influenced by other considerations that nationality clauses appear. Thus in many cases of non-contributory benefits financed by the state, we find a restriction of benefits to the nationals of that state; examples are the student social security system in France, or certain old age benefits in the same country, like the Association aux vieux travailleurs salaries, the association temporaire aux vieux<sup>(7)</sup>; presumably the restriction to Dutchmen of transitional benefits under the old-age scheme (AOW) and the "widows and orphans" scheme (AWW) in the Netherlands rests on the same grounds<sup>(8)</sup>. Perhaps this is also what is at the basis of the surprising and rather shocking rule in Belgium that the retirement and survivor's pensions of manual workers ("ouvriers") is to be reduced by 20% if the beneficiary is of foreign nationality<sup>(9)</sup>.

A second reason given for limiting benefits is that the benefit may be designed to achieve some political, generally demographic, end. If the French government gives a special benefit on the birth of a child to encourage fertility, it is not to have more Algerians and Spaniards, "c'est pour avoir beaucoup de petits Français!"<sup>(10)</sup>. Thus we find that such "primes de naissance" are limited in both France and Luxembourg to nationals of these countries<sup>(11)</sup>.

Another reason which may sometimes motivate discrimination against non-nationals is the desire on the part of the discriminating state to use its discriminations as a bargaining counter in negotiations with other states which discriminate against its own nationals<sup>(12)</sup>.



(ii) Conservation of acquired rights: The problem here is not that of open discrimination against foreigners, but more complex and more difficult to solve. The restriction is not one of nationality but of residence: where a person or his family is not resident in the state in which he has acquired social security rights, what happens to those rights? In what circumstances, if at all, will state A provide benefits to a person in state B?

In theory obstacles could be raised by either state A or state B. In practice, however, the legal problems raised by state B will confine themselves to taxation, which we must leave aside here. Let us imagine then a migrant, a national of state B, who goes to work in state A and there acquires a right to the various social security benefits granted by that state: sickness, disability, family benefits, old age, etc. If the migrant now goes outside state A, for a short period, either to state B or elsewhere, and falls ill or is killed, will he receive sickness benefit and medical care, and will his widow receive a widow's pension? Or again, if the migrant working in state A is forced to leave his wife and children in state B, will he receive a family allowance to help him support them, or will the fact that he has a family be taken into account in assessing his sickness benefit or unemployment benefit? Or again, if he can no longer work because of disablement or old age, and returns home to state B, will he continue to receive an old age pension or disablement or industrial injury benefit from state A? In none of these cases need there be any question of discrimination against foreigners, yet it is clear that the answers to these questions are of great importance to migrants and their families.

The answers to these questions, whether a potential beneficiary will benefit only if he satisfies certain residence requirements,



depend principally on two factors: the conception behind the social security scheme involved and the practical administrative problems which provision of the benefit would raise.

The two social security conceptions which are opposed in this matter are the notions of personality and territoriality of social security. Under the notion of personality, social security rights are seen as adhering to a person. This is closely related to the contractual or insurance concept of social security: the benefits have been earned by the beneficiary: they are the counterpart either of his contributions to the system or of the work he has contributed to society. As he has earned his social security rights, he may take them with him wherever he goes, and there is no reason for not serving social security benefits abroad. The territoriality concept, on the other hand, is not unconnected with the notion of social security as a public service: it is for each country to satisfy the social security needs of those who are on its territory. As the social security benefit is not the direct counterpart of the contribution, it is not a contractual right but the idea of public service which forms the link between the state and the individual beneficiary<sup>(13)</sup>. But probably the links between personality and contract, on the one hand, and territoriality and public service on the other should not be pushed too far. It seems more likely that the prevalence of the territoriality principle owes less to the notion of social security as a public service within a state than to the existence of (and unreadiness to overcome) administrative problems attached to the service of benefits abroad. May we not explain the fact that old age pensions are more often "exportable" than are unemployment benefits, by observing, not (or not only) that unemployment benefits are further

divorced from the insurance principle than are old age pensions, but that, whereas administrative control of some kind may be necessary to check that a recipient is still unemployed, no such control is necessary to ensure that an old age pensioner remains old? That this is indeed the case is suggested by the fact that in Belgium, where the old-age pension is a retirement pension payable only on the cessation of professional activity, the pension is not paid outside the country because there would be no means of checking whether the recipient had indeed retired<sup>(14)</sup>.

Be that as it may, the migrant is almost certain to encounter difficulties if he leaves his country of employment either for a short or for a long period, or if he leaves all or part of his family at home. The general rule is that of territoriality, that is, he will not be able to receive any benefits outside his country of employment. There are exceptions to this. In many cases he may receive sickness benefit and medical care if he receives a special authorisation from the social security institution before going abroad, or if he falls ill unexpectedly while away. Under Dutch legislation, more generous than other legislations in this respect, a number of benefits may be provided abroad: old age, widows' and orphans' pensions, industrial injury and disease benefits, even family allowances. In some cases, a lump sum in lieu of pension is paid when the worker leaves the country: a sum equivalent to three years' pension is paid to non-nationals leaving the country in the case of French industrial accident benefits and Luxembourgish old age and disablement pensions. This is clearly to the detriment of any beneficiary whose expectation of life is greater than three years. Yet even this is better than receiving nothing at all, as would happen under the strict territoriality principle<sup>(15)</sup>.



The provision of long and short-term benefits outside the country is, therefore, an important problem to be dealt with by international treaties.

(iii) Conservation of rights in the process of being acquired:

If the two problems already mentioned may be said to stem from the public service character of social security, then this third problem flows from those features of social security more closely linked to the notion of insurance, or, more specifically, from the idea that a right to a benefit is acquired only after contributions have been paid during a certain period of time. The person concerned will have no right to a benefit before this period is completed.

The subordination of social security rights to such a minimum period is very widespread among the present members of the EEC, with the exception of the Netherlands, which is again more generous in this respect. The length of this period varies according to the nature of the benefit: there is never any such period in the case of industrial injury benefits, where the benefit is seen as arising from the mere fact of a contract of employment. In the case of sickness and maternity benefit, the period is either non-existent or very short (60 hours in France, but 6 months in Belgium); for unemployment benefit it is generally about 6 months. It is in the case of the long-term benefits, essentially old-age, disablement and survivors' pensions, that the minimum period can cause serious problems for the migrant. In these cases, the minimum period required may be anything up to 15 years (as in the case of the German old-age pension), or even 25 years (as for some miners' pensions, for which long periods are required in all the countries).



The problem is simple enough: a migrant worker who works in several different countries might easily fail to satisfy the minimum old age pension requirements in any of those countries and be left without any pension at the end of his working life.

A variant of the same problem occurs where the condition of a minimum period of contribution either is satisfied or does not exist, (as in Belgium, for instance), but where the amount of benefit paid depends on the period of contribution. This is the case in all the original member countries except the Netherlands. The problem here is the same: that of taking periods of insurance in another country into account in the calculation of pensions<sup>(16)</sup>.

Another variant on the same problem arises in the case of industrial injury or disease benefits. Under German law, for example, (and the laws of Belgium, France and the Netherlands present the same problem), 20% loss in capacity is required before an industrial injury pension can be awarded. In calculating this minimum limit, previous accidents (or industrial diseases, as the case may be) are taken into account, so that it would suffice if the worker lost 10% capacity in each of two accidents. However, accidents are normally counted only if they happen outside Germany, so that for the migrant, the problem of the aggregation of industrial injuries in different countries presents itself in much the same way as does the problem of aggregating periods of insurance<sup>(17)</sup>.

(iv) Choice of Law: Finally, there is the problem of determining which law governs the rights and duties of the migrant worker. If a worker lives in one country and works across the frontier in another, or if he is sent by his employer in one country to work

for a few weeks in another, by which social security system will his rights be governed? If he lives in a different country from his children, which law will determine his entitlement to a family allowance? Is it conceivable that a court or other institution in one country should have to apply the social security law of another country?

This question of the choice of law has to be answered before any benefit can be awarded. Since the applicability of the various schemes may be governed by different criteria (residence, employment, etc.), the unbridled operation of national laws might mean that a worker would find himself subject to two laws at once or to no law at all. Here is another problem to be solved by international law<sup>(18)</sup>.

In the absence of international co-ordination of social security law, the worker who moves from one country to another is playing a game of chance in which the odds are weighted against him. Depending on his luck (or, conceivably, his skill), he may find that he has a right to no social security benefits, to normal benefits or to two or even more times the normal benefit. The object of co-ordinating social security law internationally is to normalise the position of the migrant, to ensure that he is provided for, but only once.

#### B. Solution of problems by Treaty

##### (1) Development of international social security law:

The regulation of the social security rights of migrant workers by international treaty is nearly as old as the institution of social security itself. The first treaty concerning the social security of



migrants was concluded by France and Italy as long ago as April 15th 1904. This treaty contains provisions on old age, industrial injuries and unemployment insurance. This example was soon followed in a large number of bilateral treaties concerned with the conditions of migrants. The principle adopted in these early treaties was that of equal treatment of the nationals of the contracting parties on the territory of each of them. But some treaties went further than that, and in another Franco-Italian treaty, that of September 30th 1919, we find already the notion of the aggregation of periods of contribution in assessing the rights of the migrant.

After 1919 this growth in the number of bilateral treaties was stimulated and accompanied by the work of the ILO, which sought by means of recommendations and international conventions to spread the principle of equal treatment of nationals and non-nationals in social security matters. States ratifying Convention No. 19, for instance, which came into force in 1926, guaranteed the equal treatment with their own nationals, in the matter of industrial injury benefits, of the nationals of other states ratifying the convention.

But it is really after the second world war that an enormous expansion in the number of international social security agreements took place, particularly in Europe. It has been calculated<sup>(19)</sup> that between 1946 and 1966, 401 bilateral agreements on social security were signed, and that in 94% of these agreements both parties were European, while a large number of the remaining 6% had one European signatory. These post-war treaties are more sophisticated than the earlier ones and seek to tackle not only the problem of discrimination against non-nationals, but also that of the conservation of acquired rights and of rights in the process of being acquired: the methods by which they sought to do so are considered below.



After the last war too it was realised that even a thick network of bilateral agreements would be inadequate to meet the needs of those workers whose career spills over into more than two countries or whose families may be scattered in more than two countries. In these cases there had to be some co-ordination between all the countries concerned: multilateral treaties were needed.

The first step in this direction was the conclusion between the members of the Brussels Pact (Belgium, France, Great Britain, Luxembourg and the Netherlands) of two agreements in Paris on November 7th 1949. The first of these concerned medical and social assistance; the second sought to tie together the various bilateral agreements which had been concluded by these countries. Tripartite agreements along similar lines were also concluded between Belgium, France and Italy (Jan. 19th 1951) and between France, Italy and the Saar (November 27th 1952). The Council of Europe tried to extend the Brussels Pact agreement so that it would cover all of the members of the Council, but this ambition was hindered by the fact that, whereas the Brussels Pact agreement co-ordinates a network of bilateral agreements previously concluded between the signatory states, no such network existed between all the states members of the Council of Europe. In the meantime, until such a network should come into being, two interim agreements were concluded on December 11th 1953, the one covering old age, disablement and death, the other covering the other branches of social security. The interim agreements have since been succeeded by the European Convention on Social Security, elaborated by the Council of Europe and opened to signature by the member states of the Council on 14th December 1972. To the solutions adopted by these multilateral treaties we shall return in due course.

Finally, there have been a number of multilateral treaties concluded under the auspices of the ILO and restricted to certain groups of workers. Most interesting of these are those covering the Rhine boatmen, international transport workers, refugees and stateless persons<sup>(20)</sup>.

(ii) Principles adopted by social security treaties

A number of techniques were developed by the international treaties to overcome the obstacles to the provision of social security benefits for migrants. We shall look briefly at the techniques developed to meet each of the problems outlined, and then at the special solutions adopted by the multilateral treaties which preceded Regulation No. 3.

(a) Equal treatment of nationals

The overcoming of discriminations against non-nationals provides no difficulties of a technical nature: bilateral treaties have simply provided that each contracting state should treat the nationals of the other contracting state as if they were its own nationals. This principle, however, although immediately recognised, did not succeed in doing away with the problem of nationality restrictions even within Western Europe. This is so for a number of reasons. The treaties are often limited in their application. Often they cover only certain specified branches of social security. Again, although the treaty will usually apply in a general manner to the present and future "legislation" governing that branch, exceptions are often made<sup>(21)</sup> and, even where this is not the case, each state generally retains the right to refuse the application of the treaty to any new category of beneficiary covered by an extension of the domestic social security system. Even where a specific law is covered, it may be that not all discriminations contained in that law are removed.



The treaties may also be limited in their personal application. Usually, though not always, they apply only to nationals of the two states, so that a Spanish worker, say, who works in France for twenty years before going to continue his career in Belgium will gain nothing from a treaty concluded between France and Belgium. Many treaties require the beneficiary to be not only a national of one of the two countries but also resident in one of them; in the case of the same hypothetical agreement between France and Belgium, a Frenchman living in Germany would be in no better position than the Spaniard. Finally, some treaties do away with nationality restrictions only to replace them by residence requirements, which vary with the nature of the benefit in question. The European interim agreement, for example, grants equality of treatment in the case of non-contributory old age, disablement and survivors' pensions only to those non-nationals who have resided in the country for at least fifteen years.<sup>(22)</sup>

(b) Conservation of acquired rights:

One might have expected that it would be easy enough to remove residence restrictions, yet progress in this area has been fragmentary. As we have seen, residence requirements are sometimes the counterpart of real administrative problems, and a country of immigration, though it may have reason to provide social security for its foreign workers while they remain in the country, has, no doubt, little incentive to overcome these problems and provide for them when they leave the country. The inquiry conducted by the High Authority of the ECSC into the position of non-nationals from certain countries in the five labour-importing members of the EEC found that the agreements concluded by Belgium, France and Luxembourg were particularly faulty



in this respect<sup>(23)</sup>. The area in which least progress has been made and which causes most concern is the question of providing family benefits in respect of children who have been left in the country of emigration (or indeed in a third country). Where such benefits are granted, they are often subject to a time limit of two or three years, and are often at the rate of benefit of the country of emigration, or sometimes at whichever of the two possible rates (i.e. that of the country of emigration and that of the country of immigration) is the lower.

When provision is made for payment of benefits abroad, certain practical arrangements have to be made for carrying out that provision. Broadly speaking, there are two possible methods. Payment may be made directly to the beneficiary by the institution to which he is affiliated: this is the method usually employed where control of the condition of the beneficiary is not too complex, as in the case of pensions or sickness benefit. Alternatively, the institution of the country of residence provides the benefit as it would to its own beneficiaries and then settles its account with the debtor institution separately. This arrangement is found more practical in granting medical care. Though we can pay little attention to them here, it should not be forgotten that the administrative provisions of these treaties and their protocols play an important part in the internationalisation of social security<sup>(24)</sup>.

**(c) Conservation of rights in the process of being acquired:**

The general principle here is that of aggregation, that is, of the assimilation of periods of contribution under the two regimes. But a distinction must be made between the three branches in which the problem generally occurs: sickness and maternity benefits, old age

(and survivors') pensions, and disablement pensions; unemployment is rarely covered.

The preliminary period for sickness and maternity benefits is, as we have seen, usually very short if it exists at all. If the period required by the country of immigration is not satisfied, then the treaties normally provide that the periods of contribution in the two countries may be aggregated to satisfy this requirement; the benefits or care are then provided by the institution of the country of immigration, normally without any right to claim reimbursement from the institution of the country of emigration. But in order to prevent frauds, it is usually provided that the institution of the country of immigration should not support the charge of the benefits unless the beneficiary has worked or been insured in the new country and the illness has been contracted after immigration; in the case of maternity, this means that it is the institution to which the mother was subject at the presumed date of conception which must finally support the costs involved.

More complex are the arrangements in the case of old age pensions. These are often subject to a very long preliminary period of contribution and in most of the countries of Western Europe (including all the member states of the EEC except the Netherlands) they vary with the number (and the amount) of contributions paid. Where this is not the case in either country (as in agreements between Scandinavian countries), the whole of the pension may be provided by the country of residence. But where the pension is related to contributions paid, a more complicated procedure is followed, that of aggregation and "proratisation"<sup>(25)</sup> (division pro rata temporis). This involves two steps:



- First, each country determines the amount which the claimant would have received under its own legislation if he had been insured in that country for the total duration of his periods of insurance, that is, it treats the periods accomplished in another country as if they had been accomplished under its own legislation;
- secondly, each country divides the amount thus obtained in proportion to the period of insurance in fact accomplished under its own legislation: this is the division pro rata temporis, or "proratisation". Each country then pays the resulting pension.

In fact, numerous other practical arrangements, involving the calculation of periods (in months, weeks, days, etc.), the consideration of periods which though not in fact periods of contribution are treated as such (periods of illness, military service, etc.) and many other problems, make the system extremely complicated. It is this system, embodied in Articles 27 and 28 of Regulation No. 3, which was to give rise to most of the social security problems coming before the Court of Justice.

This system of aggregation and proratisation is not, without modification, suitable where one party to the treaty has a pension system under which the pension is not directly related to the contributions: this too will become clear when we examine the problems of Regulation No. 3 involving the Dutch system. For this reason, it is perhaps worthwhile looking at the treaty of June 30th 1951 between France (which has a contributory system) and Denmark (where the pension is based on residence). The mechanism employed here is even more complex:



- the pensioner receives a pension determined according to the law of the country of residence and provided by the institutions of that country;
- the periods of residence in Denmark after the 18th birthday are assimilated to periods of insurance in France. These periods are aggregated with the periods of insurance in France;
- the French institutions bear the charge of a pension calculated according to French law, aggregated and proratised as explained above;
- if the pensioner is resident in Denmark, then he receives either the Danish pension or the proratised French pension, whichever be the higher. The French institutions reimburse to the Danish institutions the amount of the proratised French pension;
- if the pensioner is resident in France, then he receives a pension calculated according to French law and corresponding to the total period obtained by aggregating the periods of insurance in France and the periods of residence in Denmark. Then the Danish institution reimburses to the French institutions the fraction of the pension which corresponds to the periods of residence in Denmark.

Disablement may be seen either as anticipated old age or as prolonged illness. In the former case, the amount of the pension will vary according to the period of contribution; in the latter it will not. On this will depend the manner in which the problem is dealt with. The treaties usually provide for one of the three following solutions:

1. the granting of a pension composed of two elements, after aggregation and proratisation, as with old age pensions;
2. the granting of a single pension calculated according to the law of the country in which the pensioner became disabled and paid for by that country; or
3. the granting of a pension, the cost of which is divided between the two countries and which may not be inferior to the more advantageous of the two pensions which would have resulted from the application of the two methods mentioned above<sup>(26)</sup>.

(d) Choice of law: No doubt because a person's social security rights and duties often depend on his status as a worker, the principle generally adopted in international agreements is that the law applicable is that of the place of work. The law of the place of residence applies only in the case of those who exercise no professional activity.

An exception is generally made in the case of those who are dispatched to work abroad for a short time (generally less than six months); such persons generally remain subject to the law of their country of origin.

Special arrangements are made for special cases, as where a border runs through the middle of a factory, for international transport workers, seamen, embassy staff, etc.<sup>(27)</sup>.

(e) Multilateral treaties: We have seen that the disadvantage of bilateral treaties is that they fail to cater for those who have been insured in more than two countries or who have dependants living in more than two countries. The remedy sought by the early multilateral

agreements (we refer to the Brussels Pact agreement and the two European interim agreements) is the co-ordination of bilateral agreements concluded between the signatory states. There already existed a complete network of bilateral agreements between the parties to the Brussels Pact agreement. This agreement provides that the provisions of each bilateral treaty shall apply to the nationals of any of the contracting parties. Where a person has worked in more than two of the contracting states, aggregation (and, if necessary, pro-ratisation) may take place with regard to all the periods of insurance in each country. Where the dependants of an insured person, who is a national of one of the contracting parties, normally reside on the territory of one of the five states while the insured person works in another, then the dependants receive benefits in kind (essentially medical care) granted by the social security law of the country of residence and at the charge of the institutions of that country. Finally, Article 11 of the agreement provides that the agreement may, with the agreement of all the parties, be extended to cover the nationals of any country which has concluded bilateral social security agreements with all of the said parties.

The European interim agreements are less complete, for the network of bilateral treaties between the member states of the Council of Europe was only half completed at the time when the interim agreements were concluded. The interim agreements have a double aim:

- to ensure equal treatment for the nationals of the contracting states; but in some cases removal of nationality restrictions is subject to a residence requirement: in the case of non-contributory old age, disablement and survivors' pensions a period of fifteen years, of which five must be uninterrupted.



- to extend to the nationals of all the contracting parties the advantages flowing from the bi- or multi-lateral social security agreements which have been or will be concluded between two or more of the contracting parties.

Article 9 of the two agreements weakens their force to some extent: it allows contracting parties to formulate a reservation limiting the application of these two principles with regard to any social security regime or any of the treaties which it has concluded. Several states have made use of this procedure<sup>(28)</sup>.

### C. Conclusion

It may be helpful to summarise this sketchy outline of the problems which confronted the authors of Regulation No. 3 and the antecedents with which they were presented:

1. The obstacles to be overcome in providing social security for migrants are chiefly four:
  - (i) Nationality restrictions;
  - (ii) Residence restrictions (loss of acquired rights);
  - (iii) Loss of rights in the process of being acquired;
  - (iv) Problem of the choice of law.
2. Solutions were sought by means of bilateral and then multi-lateral conventions:
  - (i) By removing nationality and residence restrictions;
  - (ii) By providing for aggregation (and in some cases "proratisation") of periods of insurance in the different countries;
  - (iii) By choosing the law of the place of work as the law applicable;

- (iv) By making the necessary administrative arrangements and establishing the necessary collaboration between social security institutions.

Nevertheless, many lacunae remained. In particular:

- (1) Not all nationality restrictions had been removed;
- (2) Many residence restrictions remained, particularly in the field of family benefits;
- (3) The system of aggregation and proratisation is complex and unsuitable where one contracting party has a non-contributory pension scheme;
- (4) Many subjects were untouched or inadequately covered by international treaties, such as unemployment benefit, voluntary and complementary insurance schemes;
- (5) Despite the large number of treaties, the network was still far from complete; until the European convention which was to become Regulation No. 3, no agreement existed between West Germany and Belgium, nor between Germany and Luxembourg.

For these reasons the provision of social security for migrant workers still constituted a problem when the E.C. were set up<sup>(29)</sup>.

## 2. Regulation No. 3: Origin, Structure and Principles

### A. Origin

Although Regulation No. 3 has now been superseded by Regulation No. 1408/71, its analysis is of more than mere historical interest. Not only did it mark an important advance in the international

regulation of the social security position of migrants, but it provided the basis for the later regulation: Regulation No. 1408/71 retains the same structures and principles as Regulation No. 3, although it aims to provide more complete solutions to some problems and to remedy many of the defects which had become apparent in the old regulation. There can be no doubt that the judicial interpretation of Regulation No. 1408/71 will be based on the principles developed in the interpretation of Regulation No. 3.

The origins of Regulation No. 3 must be sought, not in the Treaty of Rome, but in the Treaty of Paris establishing the ECSC. One of the aims of this treaty was to promote the free movement of qualified coal and steel workers<sup>(30)</sup> and the problems relating to social security were seen as an obstacle to such free movement. Consequently, Article 69 (4) of the ECSC Treaty provided:

"Ils (les Etats membres) interdiront toute discrimination dans la rémunération et les conditions de travail des travailleurs nationaux et travailleurs immigrés, sans préjudice des mesures spéciales intéressant les travailleurs frontaliers; en particulier, ils rechercheront entre eux tous arrangements qui demeureraient nécessaires pour que les dispositions relatives à la sécurité sociale ne fassent pas obstacle aux mouvements de main-d'oeuvre".

Making use of the power granted to it by Article 69 (5), "d'orienter et faciliter l'action des Etats membres pour l'application des mesures prévues au présent article", the High Authority undertook at the end of 1953, together with a group of national experts and with the technical assistance of the ILO, the preparation of a European convention on social security. It was intended that this convention,



although under the auspices of the ECSC, would apply to all employed workers and those treated as such: although coal miners usually benefit from a special social security system, this is not the case for steel workers. This convention was signed in Rome on December 9th 1957, but it was never ratified.

This was because the treaty establishing the EEC intervened. One of the aims of the EEC treaty is to establish the free movement of labour within the Community and one of the chapters<sup>(31)</sup> of the treaty is devoted to that aim, described by the treaty itself as one of the 'foundations' of the Community. The last of the four articles in this chapter is Article No. 51, which says much the same as Article 69 (4) ECSC, but with more precision and force:

"Le Conseil, statuant à l'unanimité sur proposition de la Commission, adopté dans le domaine de la sécurité sociale les mesures nécessaires pour l'établissement de la libre circulation des travailleurs, instituant notamment un système permettant d'assurer aux travailleurs migrants et à leurs ayants droit:

- (a) la totalisation, pour l'ouverture et le maintien du droit aux prestations, ainsi que pour le calcul de celles-ci, de toutes périodes prises en considération par les différentes législations nationales,
- (b) le paiement des prestations aux personnes résidant sur les territoires des Etats membres"<sup>(32)</sup>.

In view of this article and the power it granted to the Council, it was decided that the simplest course was to adopt the European Convention as a Regulation of the new Community, thus avoiding the need to have the Convention ratified. With only slight modifi-

cations, the text of the Convention was adopted by the Council on September 25th 1958 as Regulation No. 3. The administrative arrangements which had been prepared for the application of the Convention were then adopted as Regulation No. 4 on December 3rd 1958<sup>(33)</sup>. We shall see that the origin of these Regulations was to cause some difficulties in their interpretation.

It soon became clear that these complex regulations contained a number of faults and minor modifications were introduced by later regulations. The system was also completed by three fairly important regulations covering persons not covered by Regulation No. 3: Regulation No. 36/63<sup>(34)</sup> covers frontier workers and Regulation No. 73/63<sup>(35)</sup> covers seasonal workers. A third regulation<sup>(36)</sup> applies to seamen.

These later regulations naturally increased the complexity of the system. As early as 1963, work was begun on the revision of Regulation No. 3; the result was the Regulation No. 1408/71, which now replaces the other regulations. But as the new regulation retains the same principles as the old, we shall first examine Regulation No. 3 before considering its revision<sup>(37)</sup>.

#### B. Structure and Function of Regulation No. 3

Structure: As regulations go, Regulation No. 3, with its fifty-six articles and seven annexes covering thirty-one pages of the Journal Officiel, is quite long. Its fifty-six articles are divided up under five Titles.

Title I (Dispositions générales) begins with an article of definitions - a surprising "anglo-saxonism" which Lyon-Caen finds baffling<sup>(38)</sup> - then defines the scope of application of the Regulation (Articles 2-4), its relation to international social security con-



ventions (Articles 5-7) and sets forth some important general principles (Articles 8-11).

Title II (Dispositions déterminant la législation applicable) gives rules for deciding what law is to be applied (Articles 12-15).

Title III (Dispositions particulières) contains seven chapters dealing with the different branches of social security covered (maladie-maternité (Articles 16-23); invalidité (Articles 24-26); vieillesse et décès (pensions) (Articles 27, 28); accidents du travail et maladies professionnelles (Articles 29-31); allocation au décès (Article 32); chômage (Articles 33-38) and allocations familiales (Articles 39-42). An eighth chapter establishes a Commission administrative and defines its function and composition (Articles 43-44).

The two other Titles (Dispositions diverses (IV) and Dispositions transitoires et finales (V) contain mainly administrative provisions.

### C. Principles adopted by Regulation No. 3:

There is nothing very revolutionary about the approach adopted by Regulation No. 3. The starting-point here, as in other international social security arrangements is formed by the principles already discussed - equality of treatment, aggregation, etc. But in the application of these principles Regulation No. 3 goes much farther than any previous international arrangement. We shall look briefly at the solutions adopted by Regulation No. 3 in the same order as that in which we considered them in relation to bilateral and multi-lateral treaties: equality of treatment; conservation of acquired rights; conservation of rights in the process of being acquired; and the special problems of multi-lateral treaties. We



shall end by looking at the special administrative and jurisdictional arrangements; and we shall begin by making a few comments on the scope of its application.

(1) Scope of application:

Details of the scope of application of Regulation No. 3 *ratione materiae*, *ratione personae* and *ratione temporis* are to be found in Articles 2 and 3, Article 4 and Article 5 respectively. Suffice it here to point out that Regulation No. 3 applies to all legislation concerning the nine branches of social security mentioned by Convention No. 102 of the ILO, that is: sickness, maternity, disablement, old age, survivors, industrial injuries and diseases, death, unemployment and family benefits, whether the social security regime be general or special, contributory or non-contributory. Social and medical assistance and special arrangements for public officials and war victims are expressly excluded. The most important omission is that of "complementary regimes", that is, of occupational and other schemes which seek to provide benefits (usually old age pensions) outside and in addition to the basic state system.

*Ratione personae*, the regulation does not apply to non-nationals of the member states (except in the case of resident refugees and stateless persons), nor does it apply to "independent" (i.e. self-employed) workers (unless they are "assimilated to the position of an employee"); nor, finally, is there any express requirement that the worker claiming benefit from Regulation No. 3 must be a "migrant". When we come to the work of the Court of Justice, we shall see that the interpretation of Article 4 caused some difficulty.

(ii) Equality of treatment:

The incorporation of this principle in Article 8 of the Regulation is but one application of the general principle of equal treatment of nationals of the member states in the application of the Treaty of Rome set forth in Article 7 of the Treaty and reiterated with regard to conditions of work by Article 48 of the Treaty. The importance of this principle in Community thought is reflected by the sweeping terms of Article 8 of the Regulation. Despite this, Regulation No. 3 permits some small exceptions to this principle to subsist. Annex A (which specifies the legislations to which the Regulation applies) specifically excludes the French "allocation de maternité" and the Luxembourgish "prestations de naissance"; we have seen that in both of these cases, nationality restrictions exist for political, demographic reasons. Nor does Regulation No. 3 affect restrictions barring non-nationals from participation in the management of social security institutions (a right of insured persons under many social security schemes in the Six).

(iii) Conservation of acquired rights:

It is the removal of residence restrictions that Regulation No. 3 has made most progress over pre-existing treaties. For the first time it becomes the general rule, rather than the exception, that benefits may be provided abroad, or in respect of persons living abroad.

Article 10 (1) establishes this principle in general terms with regard to the long-term benefits, although the second paragraph of that article provides for some fairly minor exceptions in the case of some non-contributory pension arrangements, usually of a transitional nature: these are defined in Annex D.

In the event of sickness or maternity, where the removal of residence restrictions raises more problems, provision is nevertheless made for the provision of benefits abroad:

- where the worker or a member of his family is temporarily in another country of the Community and their condition requires immediate treatment;
- where residence is transferred during an illness;
- when the family continues to reside in another member state;
- when a pensioner lives in a member state other than that which pays the pension, where the pension carries with it a right to free medical treatment.

In each case benefits in kind are provided by the institution of the place where the patient is at the time; in general, reimbursement may be sought from the institution to which the insured was affiliated. Payment of money benefits is made either directly by the institution of affiliation or through the other institution. In either case, the insured person is subject to the medical and administrative control of the latter institution. Similar arrangements have been made for industrial injury and disease benefits.

Article 35 provides for the "export" of unemployment benefits, a provision contained only in very few bilateral treaties. The right to receive these benefits abroad is, however, limited to a maximum period of four months and subject to the prior authorisation of both the debtor institution and the institution of the new place of residence. Another important limitation is the reservation by France and Luxembourg, restricting the application of this article to qualified coal and steel workers - a remnant reminding us of the



origin of Regulation No. 3. The benefit is paid through the institution of the new place of residence at the rate of the place of last employment. This institution supports a small part of the cost, the rest being reimbursed to it by the institution of affiliation.

A third area in which an important step forward has been made is that of family benefits, which must, under Regulation No. 3, be paid also in respect of members of the family living in another member state. There was originally a limit of three years, but, in view of the difficulty of re-uniting families, this was later removed. The benefit is paid by the institutions of the country of employment, but may not be more than the amount which would be payable under the legislation of the country of residence. As in the case of unemployment, the system was still not perfect, although considerable progress had been made<sup>(39)</sup>.

There is further help for the worker who is separated from his family, in the provision (in Article 18 (2), 26 (4), 28 (1) (d) and 34 (2)) that where the amount of other types of benefit (sickness and maternity, disablement, old age, unemployment) varies with the number of members of the family, then those members resident in another member state should be taken into account.

(iv) Conservation of rights in the process of being acquired:

Article 51 of the Treaty itself provided that any measure taken by the Council should provide for the aggregation of periods of insurance in the various countries. The principle is adopted by a number of articles in the Regulation in the branches of sickness and maternity (Article 16), death grants (Article 32), unemployment

(Article 33), family benefits (Article 39) and, of course, for disablement (cf. Article 26) and old age and survivors' pensions (Article 27), where aggregation is combined with proratisation (Article 28). We shall have ample occasion to return to the endless entanglements of Articles 27 and 28 when we come to the problems which were to face the Court of Justice.

Where the existence of previous accidents or diseases is liable to affect the assessment of an industrial injury or disease benefit, such accidents or diseases must be taken into account even if they occurred in another member state (Article 30).

(v) Choice of law:

Regulation No. 3 adopts the normal rule in international social security treaties, that the law applicable should be that of the place of work (Article 12). Article 13 provides several exceptions to this rule, the most important of which is that provided for workers sent abroad to work for a period of up to twelve (and not just six) months.

(vi) Problems relating to multi-lateral conventions:

The Brussels Pact agreement and the two European interim agreements all aimed to co-ordinate the system of bilateral treaties. Regulation No. 3, on the other hand, aims to take the place of existing bilateral treaties, and the general rule is that it does replace existing treaties between the member states (Article 5). Exceptions are made in the case of ILO Conventions, the two European interim agreements, the Rhine boatmen agreement, the treaty of 9.7.1956 covering international transport workers, and a number of provisions of bilateral treaties between member states (Article 6). These provisions are specified in Annex D and are generally

provisions more favourable to migrants or administratively more convenient than the provisions of Regulation No. 3. For example, there were a few conventions which contained provisions on the payment abroad of unemployment benefits more favourable than those contained in Article 35, Regulation No. 3; these provisions are preserved in Annex D. As for the future development of social security relations between the Community countries by means of bilateral treaty, member states may conclude agreements between them as long as they are founded "sur les principes et l'esprit du présent règlement" (Article 7). Other mentions of bilateral conventions are contained in Article 25 (disablement), Article 41 (family benefits)<sup>(40)</sup> and Article 52 (subrogation). The Court of Justice had had to deal with the problem of bilateral treaties on a number of occasions.

(vii) Administrative and jurisdictional arrangements

Regulation No. 3 and, in more detail, Regulation No. 4 organise a close collaboration between the social security institutions of the various countries, which are bound to lend one another their "good offices" in the application of these regulations. To facilitate this collaboration, a central liaison organ has been set up in each of the countries.

The functioning of the system is further facilitated by the creation of the Commission administrative (Articles 43, 44 of Regulation No. 3). This Commission is composed of a representative of each member state, in practice the director general of social security. A representative of the Commission of the EC also participates, but without the right to vote, and technical assistance is given by the ILO. Its secretariat is provided by the EC Commission.



The Commission's main functions are to settle problems of administration and - acting unanimously - of interpretation (though it is not a jurisdiction, and its decisions do not preclude recourse to a national court, nor to the Community court<sup>(41)</sup>); to help with the financial transactions under Regulation No. 3 between the social security institutions; to provide translations; to promote collaboration in matters of social security; and to make proposals to the Commission of the EC for the revision of Regulation No. 3 and later social security regulations. Its work has been important in the implementation of Regulation No. 3, involving the drawing-up of essential forms and lists, decisions on problems of application and interpretation, the most important of which are published in the Official Journal and are directly applicable in the member states, and proposals for the improvement of social security regulations. The Commission publishes an annual report on the regulations concerning the social security of migrant workers. Another important advantage of the system instituted by Regulation No. 3 - although not mentioned in the regulation itself - is the authority of the Court of Justice of the European Communities to give a binding decision on problems of interpretation of the Regulation. This authority, which results from Article 177 EEC, has proved important in view of the complexity of the Regulation.

#### D. Conclusion

Regulation No. 3 continues the work of the international social security treaties in helping those who move from one state to another to surmount the national barriers. It not only deals with the same problems as the international treaties which had preceded it, it also adopts the principles developed by them. This is not surprising as it

owes its own origin to an international convention signed by the six states on December 9th 1957. As was the case with the treaties which preceded it, the object of Regulation No. 3 is not to replace national laws but to co-ordinate them.

But there is a new intensity in Regulation No. 3 not present in earlier agreements. It is not an international treaty, but a regulation of the EEC and, as such, it is directly applicable in the member states of that Community and enjoys priority over the laws of those states. Its application and administration are under the responsibility of a European body, the Commission administrative, and disputes as to its interpretation are subject to the jurisdiction of the Court of Justice of the E.C. It is to these problems of interpretation that we shall now turn our attention.

### 3. The Judicial Interpretation of Regulation No. 3

The interpretation of the social security regulations by the Courts is interesting for two reasons. Firstly, the work of the Courts has had an important influence on the development of the regulations: many of the innovations contained in Regulation No. 1408/71 result directly from the decisions of the Court of Justice. Secondly, the interpretation of Regulation No. 3 provides an interesting and somewhat neglected example of the working of the judicial system of the communities.

By the "judicial system" of the Communities must be understood not only the Court of Justice of the European Communities but also the courts of the member states in so far as they apply Community law. One of the novel features of the legal structure of the Communities is the relationship which it establishes between the national courts



and the European Court of Justice.

The application of Community law is primarily the responsibility of the national courts. The authors of the Treaty recognised, however, that if such a complex system of law fell to be interpreted by six different judiciaries, it would not be long before divergences of interpretation arose; this might result in the creation of a different body of Community law in each country; a French Community law, a German Community law, a Dutch Community law, etc. The method usually adopted in national and federal systems to ensure uniformity law is the creation of an appeal system of some sort. At the time of the creation of the EEC, however, it was felt that such a system would be untimely, that the national courts were not yet ready for it. A more intricate solution was found in the "renvoi prejudiciel" established by Article 177. This article provides that when a question of Community law arises before a national court, that court may (or, if it is a court of last instance, must) refer that question to the European Court for a preliminary ruling. Although somewhat hesitant in the early years, the national courts have come to make more and more use of the provisions of this Article, and Article 177 cases now form the major source of the Court's work.

One of the questions which may arise in the study of the interpretation of any provision of Community law is, consequently, whether the system established by Article 177 actually works, whether Article 177 has indeed succeeded in ensuring uniformity of interpretation. To this and to other ends, we shall look in turn at the case law of the Court of Justice and at that of the national courts.

#### A. The Court of Justice

Quite a high proportion of the cases sent to the Court of Justice under Article 177 have involved problems of social security; to date,



there have been no fewer than fifty reported uses involving the interpretation of Regulation No. 3<sup>(42)</sup>. The relatively large number of cases is due in part to the often overlooked importance of the Regulation, in part to its complexity - and in part to the answers given by the Court in some of the earlier cases.

The requests for interpretation have covered a wide range of problems, but the provisions which have caused most difficulty are the definition of the scope of application of Regulation No. 3 (Articles 1-4), the provisions governing the choice of law (Articles 12, 13) and the system of aggregation and proratisation of old age pensions (Articles 27, 28). But, before looking at the content of the Court's decisions and their effect on the development of the principles contained in Regulation No. 3, it is necessary to look at the general orientation which has guided the Court's interpretation: first at the Court's interpretation of the aims of Regulation No. 3 and then at the problem of the relationship between Community law and national law.

**(1) The Aims of Regulation No. 3:**

Much stress has rightly been put by commentators on the "teleological" approach adopted by the Court to problems of interpretation, on its insistence that provisions of Community law should be interpreted in the light of their aim or "spirit". The social security cases afford a very good example of this method, of its advantages and of the pitfalls into which it is liable to fall.

The interpretation which the Court has given to many of the provisions of Regulation No. 3 can be understood only in the light of its interpretation of the aims of the regulation. The interest of this interpretation of the aims is not, however, confined to Regulation No. 3, for the Court has defined the aims of the Regulation

in terms of the aims of Article 51; which provides, of course, also the basis for Regulation No. 1408/71. Article 51 is contained in the Chapter of the Treaty devoted to the free movement of workers. Time and again the Court has insisted that Regulation No. 3 can be interpreted only in the light of the articles of this Chapter (Articles 48 - 51) "qui constituent le fondement, le cadre et les limites des règlements de sécurité sociale".

What, then, are the aims of these articles, and especially of Article 51, which provide such an important guide for the interpretation of the Regulations? Not surprisingly, the Court defines this aim as being to promote the free movement of workers. This is established already in the first social security case (Case 75/63: Unger):

"que l'établissement d'une liberté, aussi complète que possible de la circulation des travailleurs, s'inscrivant dans les "fondements" de la Communauté, constitue ainsi le but principal de l'article 51, et, de ce fait, conditionne l'interprétation des règlements pris en application de cet article"<sup>(43)</sup>.

The implication is clearly that the absence of co-ordination between social security schemes would constitute an obstacle to the free movement of workers and that the purpose of the Regulations is to remove that obstacle. An "attendu" in the Court's judgment in the next case (Case 42/63: Nonnenmacher) puts this a little more fully:

"attendu que ces dispositions (Art. 48-51) tendent à établir une liberté aussi complète que possible de la circulation des travailleurs; que ce but comporte l'élimination d'entraves législatives susceptibles de désavantager les travailleurs migrants"<sup>(44)</sup>



It should be noticed, however, that there are two elements in this last phrase: the aim of establishing freedom of movement of workers is said to involve not simply the elimination of legislative barriers, but only such as are "susceptibles de désavantager les travailleurs migrants". But it should be clear that the aim, as so defined, may come into conflict with what had traditionally been seen as the aim of social security treaties and of Regulation No. 3, namely the "co-ordination" of social security schemes. It was seen at the beginning of this chapter that, in the absence of co-ordination, a migrant may, if he is lucky, fare better than the non-migrant in his entitlement to social security benefits, and that the object of co-ordinating social security laws was to deal with this anomaly as well as with the case where the migrant finishes up with no entitlement; it was asserted that the object of co-ordination was "to normalise the position of the migrant, to ensure that he is provided for, but only once"<sup>(45)</sup>. This corresponds, moreover, with the notion sometimes advanced of the "vocation européenne" of Regulation No. 3<sup>(46)</sup> and the idea that European integration involves the removal of barriers between the member states.

What if there is a conflict, if the co-ordination of the national systems is not to the advantage but to the detriment of the migrant? In such a case, the Court must decide whether the promotion of the free movement of workers by protecting their social security rights is more important than creating a logical, co-ordinated system.

This is the problem which arose in Case 34/69 (Duffy)<sup>(47)</sup>. The facts were these:

Mme D lived in France with her husband, but she had worked only in Belgium and hence received a Belgian old age pension. Her husband who had worked only in France, received a French



old age pension until his death in 1965. On his death, Mme D claimed a widow's pension from the French institution. Now, under French law, if a widow receives another French pension in her own right, this is deducted from the widow's pension she receives. Accordingly, the French institution deducted the amount of Mme D's Belgian old age pension from the widow's pension she would otherwise have received, claiming that Article 11(2) of Regulation No. 3 removed territorial restrictions to the application of such reduction clauses. When the problem came before it, the Cour d'appel de Paris asked the Court of Justice whether Article 11 (2) did have the effect claimed by the Caisse d'assurance.

Now, the text of Article 11 (2)<sup>(48)</sup> appears clearly to support the contention of the Caisse d'assurance, and Mme Duffy fell within the broad interpretation which the Court had already given to the scope of application *ratione personae* of Regulation No. 3; but, on the other hand, the removal of territorial restrictions in this case would be to the detriment of Mme Duffy.

The Commission, in its observations in the case, took the orthodox "European" stance that one might have expected:

(1) Article 11 (2) is clear and applies to this case.

Moreover, the suppression of territorial restrictions is justified because it is the "complément logique" of those provisions in the Regulation which suppress territorial restrictions to the benefit of the insured persons.

- (2) This interpretation of Article 11, Regulation No. 3 is perfectly compatible with Article 51, for the basis of Article 51 and Regulation No. 3 is the notion of "co-ordination des législations nationales", which is based in turn on the general principle of "la suppression des restrictions territoriales par la prise en considération des faits qui se produisent dans un autre Etat membre comme s'ils s'étaient produits sur le territoire de l'Etat en cause"<sup>(49)</sup>. This principle has been recognised by the case law of the Court (Case 31/64, 33/64, etc.).

Roemer, the Advocate General in the case, disagreed with the Commission. His arguments may be summarised as follows:

- (1) It is true that the text of Article 11 (2) is clear, but:
- (2) An examination of the case-law of the Court shows:
- (i) That Regulation No. 3 does not seek to organise a common system of social security but leaves the various distinct systems in existence (cf. Cases 2/67, 9/67);
- (ii) That the aim of Article 51 is to favour the free movement of workers (cf. Cases 75/63; 100/63; 44/65; 4/66; 9/67; 12/67; 22/67);
- (iii) That, moreover, the application of Regulation No. 3 may not lead to a reduction of the migrant's rights (cf. Cases 100/63, 4/66, 9/67, 22/67 and especially 2/67);
- (3) Consequently, Article 11 must be interpreted in such a



way as not to reduce Mme D's rights; this may be done either by saying that Article 11 has a narrower application *ratione personae* than the other provisions interpreted by the Court, or by limiting its application to those cases in which Regulation No. 3 has other favourable effects for the person concerned.

Here was a direct clash between the two approaches to the interpretation of Regulation No. 3. What would be the position of the Court?

The Court began by rejecting one of the "escape routes" suggested by the Advocate General, namely, that they should limit the personal application of Article 11. Instead, they adopted his other suggestion:

"que pour définir le sens et la portée de cette disposition (Art. 11 (2)), il convient de l'interpréter à la lumière des articles 48 à 51 du traité qui constituent le fondement, le cadre et les limites des règlements de sécurité sociale;

que, ces articles ayant pour but d'assurer la libre circulation des travailleurs en leur conférant certains droits, ce serait se déplacer en dehors de la finalité et du cadre desdites dispositions que d'imposer aux travailleurs une réduction de leurs droits sans la contrepartie d'avantages prévus aux règlements (50).

Thus, the Court recognises that the aim of protecting the rights of migrant workers must have priority over the approach adopted by the Commission and by many experts in the field, i.e. the idea that



the aim of the Regulations is to co-ordinate the social security systems in the sense of creating a logical, interlocking structure. It is this difference of approach which is at the bottom of many of the controversies surrounding Regulation No. 3 most notably in relation to the aggregation and proratisation of pensions under Articles 27 and 28, Regulation No. 3.

This is not to say that the notion of the "vocation européenne", of the "Europeanisation" or "deterritorialisation" of social security has been of no influence. This influence can be seen in many of the Court's decisions. It is particularly clear in Case 61/65 (*Vaassen-van Oobbeke*). One of the points at issue in that case was whether the maintenance of a residence restriction not specifically mentioned by any of the provisions of Regulation No. 3 was nevertheless incompatible with that Regulation. In its decision on the issue, the Court supported a broad interpretation by saying that this was:

"conforme à l'esprit des articles 48 à 51 du traité ainsi que du règlement No. 3, qui est d'empêcher, au delà de la protection du travailleur migrant stricto sensu qu'en matière de sécurité sociale, des clauses de territorialité puissent être opposés aux travailleurs et à leurs survivants".<sup>(51)</sup>

In his commentary on the judgment, Lyon-Caen concludes from this that:

"Le souci d'éliminer le cloisonnement territorial de la sécurité sociale est le fil rouge qui traverse d'un bout à l'autre le règlement No. 3 ... Il s'agit en effet d'un objectif essentiel du traité: au-delà de la protection du travailleur migrant lui-même, éliminer les clauses de territorialité"<sup>(52)</sup>.

This conclusion can be accepted only within certain limits. It is certain that the "deterritorialisation" approach has had considerable influence: one can see that in the decisions concerning the scope of application of Regulation No. 3, in the Court's insistence that there should be no "cumul indu" of benefits under the system of aggregation and proratisation, or in the Article 52 cases where the Court emphasises that the extension of the subrogation rights of social security institutions is the "complément logique et équitable" of the extension of their obligations entailed by Regulation No. 3. It is clear, however, from the judgment in the Duffy case (Case 34/69) that this is subject to the overriding principle that Regulation No. 3 should be so interpreted that it does not operate to the disadvantage of the migrant. As the Court emphasised in its judgment in Case 100/63 (Van der Veen), any reduction of the rights of the workers would be incompatible with the aim of Article 51:

"l'article 51 ne saurait ... permettre aux règlements de méconnaître les objectifs fixés et destinés à favoriser la libre circulation des travailleurs, lesquels seraient incompatibles avec une réduction éventuelle de leurs droits" (53).

The importance of this approach must be stressed. Since the social security regulations are subordinate to the aims of Article 51, any provision of the regulations which was incompatible with the Court's interpretation of Article 51 would, presumably, be void. Hence, the aims of Article 51 are not to be referred to only in cases where the text of the regulation is ambiguous, but must condition all interpretations of the regulations. It is logical that the aims of Article 51 ought to be considered even where the text of the regulation appears to be clear. Thus, Roemer, in presenting his



opinion as Advocate General in Case 2/67 (De Moor), said:

"Si on devait s'en tenir au seul texte du règlement No. 3, l'interprétation ne pourrait guère soulever des difficultés, à notre avis .... (mais) une telle méthode d'interprétation n'est pas suffisante pour les textes du droit communautaire ... "(54).

It is this emphasis on the aims of the Treaty provisions, and the flexibility which it allows to the Court, which explains the controversial nature of many of the Court's decisions and the sometimes daring manner in which it has developed the principles of this area of Community law.

(ii) The balance between Community and national law

The aims of Regulation No. 3, though influential, are not, of course, the only factors which determine the interpretation of one of its provisions. The text of the provision itself must naturally be considered, and also the problem of the balance between Community and national law. It is to this latter problem, a problem which traces its course through the whole field of Community law, that we shall now turn our attention.

Where Community law and national law are liable to be applied in the same case, a number of problems arise.

First, the proper sphere of each system must be determined. But even then there are other questions to be answered: what happens if both laws purport to apply to the same subject? What happens when a member state has a part to play in Community legislation and either fails to play its part or does so incorrectly?



These questions are familiar to the student of Community law, and this makes it all the more interesting to examine their treatment by the Court in the context of Regulation No. 3.

(a) Definition of the proper spheres of Community law and of national law:

Since Community law enjoys precedence over national law, defining the proper sphere of each system means in effect defining the scope of application of Community law. Since this task falls to a Community institution, the Court of Justice, it is not surprising that there is a tendency to expand the field of Community law at the expense of national law, while nevertheless trying to respect the competence of the latter. This is well illustrated by the interpretation which the Court has given to Regulation No. 3.

The problem of defining the proper spheres of Community law and of national law has arisen especially in connection with the definition of the scope of application of Regulation No. 3. The subjects covered by the regulation are defined in its first four articles but the definitions are in general terms which have naturally given rise to problems of interpretation. These terms, contained in a Community Regulation, are terms of Community law which fall to be interpreted by the Court of Justice.

The problem first arose in the first social security case (75/63 (Unger)) to come before the Court. In that case a Dutch court, the Centrale Raad van Beroep, asked whether the notion of "travailleur salarié du assimilé"<sup>(55)</sup> was defined by the national legislations or whether it had a supranational meaning. The Court, disagreeing with

Lagrange A.G. on this point, replied that the term had indeed "une portée communautaire": firstly, because the personal application of the Regulation could only be understood within the framework of Article 51, which aims to establish the free movement of workers; and secondly, because, even if the notion "travailleur salarié ou assimilé" were familiar to each of the national laws, this would not mean that it meant the same thing in each member state. Having established that it was for itself and not for the national authorities to define the term, the Court proceeded to give a fairly wide definition.

However, the object of Regulation No. 3 is not to replace, but to co-ordinate national laws, so that ultimately the scope of application of Regulation No. 3, the persons to whom and the laws to which it applies, must be determined by reference to national law. The Unger case has its complement in case 19/68 (De Ciccio) and it is well to read the two cases together. Here the question was whether Italian artisans could be considered as "travailleurs salariés ou assimilés". Although the interpretation given by the Court is not restrictive, the emphasis is much more on the fact that any definition of the application of Regulation No. 3 must refer ultimately to national law; whether one defines "assimilation" broadly or narrowly (this is for Community law to decide), there must be some sort of assimilation at the national level before Regulation No. 3 can apply. Community law in this area may perhaps be compared to a roof supported by six (or more recently, nine) pillars: the roof-builder may define the shape and extent of his roof, but ultimately he can do this only by reference to the position and size of the six (or nine) pillars.

(b) Overlapping of Community and national law

The fact that the social security regulations seek to co-ordinate the national laws does not mean that they will not overlap with those laws; on the contrary, where previously one only had to consider national law (and bilateral treaties) to see the legal position of the migrant, one now has to consider Community law in addition. Where the two sets of law - we leave aside international treaties for the moment - claim to cover the same person in the same situation, there are three problems which may arise:

- (1) If the two are incompatible, it must be decided which one enjoys precedence;
- (2) If the two are not obviously incompatible, it must be decided whether they can be applied simultaneously;
- (3) It must in some cases be decided whether an interested party may opt for the application of one law rather than the other.

Let us look briefly at each of these questions in turn to see what solution they have found within the framework of the social security regulations.

Conflict: It has long ago been decided by the Court<sup>(56)</sup> that Community law enjoys precedence over national law, as indeed it must if it is to be applied uniformly throughout the Community. The problem has never caused any difficulty in the sphere of social security law, for clearly Regulation No. 3 would not make sense if it did not prevail over the barriers raised by national law.



Simultaneous application: The problem of the simultaneous application of Community and of national law has not been posed in general terms but was the principal feature of two cases concerning Articles 12 and 13, Regulation No. 3, articles which govern the choice of law applicable.

The question in case 92/63 (Nonnenmacher)<sup>(57)</sup> was whether the application of Article 12, Regulation No. 3 (which designates the law of the place of work as the law applicable) was exclusive, or whether the law of the place of residence might also be applied. Both Lagrange, the Advocate General in the case, and the Commission concluded that the application of Article 12 must both be obligatory and exclusive. The Court, perhaps less tried in its reasoning to traditional insurance concepts of social security, agreed that the application of Article 12 should be obligatory, since its main object is to ensure that workers are covered by some system of social security. But its reasoning on the other part of the question, whether Article 12 excludes the application of laws other than that of the place of work, is as follows:

- (1) Article 12 does not expressly forbid the simultaneous application of several national laws, nor can such a restriction on the national legislature be presumed unless this is required by the "spirit" of the Treaty, especially of its Articles 48 to 51.
- (2) The only restriction which the aims of these articles impose is that the simultaneous application of national law must not be detrimental to the legal position of migrant workers:

"les articles 48 a 51 du traité ... ne permettent pas d'interdire à un Etat d'appliquer à toute sa population,

y compris à ceux de ses ressortissants qui travaillent dans un autre pays membre, un complément de protection sociale"<sup>(58)</sup>.

- (3) Therefore, the application of the legislation of another member state is forbidden only where the worker would be obliged to finance something from which he could not benefit.

This decision has not gone uncontested: Séché<sup>(59)</sup>, for example points out that it is difficult to reconcile it with the text of Article 11 (1) Regulation No. 3, while Lyon-Caen<sup>(60)</sup> has suggested that it can only be understood in the light of the particular facts of the case. But, whatever the motives which prompted the Court in this particular case, its reasoning on the relationship between Regulation No. 3 and national law is in general terms and seems quite consistent with its general "jurisprudence" on social security. A similar approach was followed in case 68/69 (Brock)<sup>(61)</sup>, where the question arose whether certain pensions could be revised "d'office", when Article 53 Regulation No. 3 provided only for revision on request. The Court replied in the affirmative:

"l'article 53 ne fait pas obstacle aux solutions éventuellement plus avantageuses pour les assurés contenues dans les législations nationales"<sup>(62)</sup>.

This, then, would seem to be the general rule.

The decision in Nonnenmacher (Case 92/63) was modified slightly in a later case, Case 19/67 (Van der Vecht)<sup>(63)</sup>, also concerning Article 12. In this case, the Centrale Raad van Beroep repeated the question which it had asked in the Nonnenmacher case, whether application of the law of the place of work excluded the law of the place of

residence. The answer given by the Court is not quite the same as that which it gave in the earlier case:

- (1) The emphasis, instead of being on what the national law can do, is on what it cannot do;
- (2) Whereas the only restriction on the power of the national legislature in the earlier case was that the national law must not harm the workers, this is now extended: the national law may not oblige either workers or employers to pay contributions which would find no counterpart in an increase in social protection.

Literally, this extension of the principle to cover employers contradicts the decision in *Nonnenmacher*, but perhaps it is more realistic to see it as expressing something merely left unexpressed in the earlier case<sup>(64)</sup>.

Option between Community and national law: Where there is a possibility that the application of national law may be more beneficial to an interested party than Community law, the problem arises whether the application of Community law is mandatory, or whether the party has some rights of option<sup>(65)</sup>. In fact, this problem has arisen only in relation to the mechanism of aggregation and proratisation and it is better considered within that context.

(c) Division of legislative competence between the Community and the Member States.

It is not only within the framework of social security that problems arise from the attribution to member states of some function in the legislative process of the Communities. But for the moment we shall confine ourselves to that framework and examine the problem



under the two aspects which have caused problems in the application of Regulation No. 3: namely, the direct applicability of Articles 52, Regulation No. 3, and the unilateral amendment of the Regulation by member states. Both of these problems are, in large part, a hang-over from the conventional origins of Regulation No. 3.

Direct applicability of Article 52, Regulation No. 3: The first paragraph of Article 52 provides for the recognition in all the member states of the subrogation rights of social security institutions; a second paragraph then adds:

"L'application de ces dispositions fera l'objet d'accords bilatéraux".

The problem soon arose whether the first paragraph gave rights to the social security institutions even where the member states had failed to conclude such agreements.

In its judgments in Cases 31/64 (Bertholet)<sup>(66)</sup> and 33/64 (Van Dijk)<sup>(67)</sup>, the Court, rejecting the arguments of the French government, held that it did not really matter if the member states had not played their part, for:

- (1) The text of Article 52 (1) is peremptory, clear and capable of direct application;
- (2) It does not appear from Article 52 seen as a whole that there was any intention to subject the rights created by it to the conclusion of the said agreements;
- (3) Moreover, the rights conferred on the national social security institutions are the "complément logique et équitable" of the extension of the obligations of those institutions to cover the whole area of the community:

(4) "qu'ainsi le deuxième alinéa trouve sa raison d'être dans la prudence de ses auteurs, désireux de permettre aux Etats de régler entre eux les détails d'application éventuels"<sup>(68)</sup>

Louis, in his comment on the decision<sup>(69)</sup>, suggests, in effect, that the second argument above was a fiction, and that there is ample evidence to show that the member states did indeed intend the first paragraphs of Article 52 to be subject to the conclusion of the agreements. Certainly, this point of view is supported by the opposition of the French Government in the Van Dijk case: it is rare for a government to intervene in a social security case where none of its nationals or institutions is involved. For this reason, Louis sees the decisions as being of political significance, in the traditions of Van Gend en Loos<sup>(70)</sup> and Costa/Enel<sup>(71)</sup>.

These decisions were more recently confirmed in case 27/69 (Entr'aide médicale)<sup>(72)</sup> and it was emphasised that, where agreements were concluded under Article 52 (2), they could not restrict the scope of Article 52 (1), but only determine the details of its application.

**Unilateral amendment of the scope of Community law by the Member States:**

The function of Regulation No. 3, we know, is to co-ordinate national legislations and it is on them that the scope of its application ultimately depends. Now, since national legislation must remain free to change, it was found most convenient to relegate certain provisions (such as the list of laws to which Regulation No. 3 applies, and the classification of disablement laws under Article 24) to Annexes. These annexes form an integral part of the Regulation<sup>(73)</sup>, but in the event of a change in national legislation, the country concerned is required to notify any amendment to the annexes that may be necess-

ary<sup>(74)</sup>.

These annexes have caused problems in a number of cases<sup>(75)</sup>, but we shall look here only at the problems concerning directly the participation or non-participation of the member state in the definition of the scope of Community law. In other words, what happens if the country concerned either fails to make any notification, or else does so, but does so incorrectly?

The former problem was one of the issues in Case 100/63 (Van der Veen)<sup>(76)</sup>. The Dutch Algemene Weduwen en Wezenwet (AWW) had been passed after the coming into force of Regulation No. 3, yet it had not been notified in accordance with Article 3 (2) and Annex B. Did this failure to notify affect the application of Regulation 3 to the new law? The Court held that it did not:

- (1) It was not necessary to notify AWW, because the general terms of Annex B already covered it;
- (2) Even if notification of AWW were required by Article 3(2), failure to notify would not affect the application of Regulation No. 3; to say otherwise would mean that any member state could "disposer arbitrairement du champ d'application"<sup>(77)</sup> of Regulation No. 3.

The delicacy of the Community-national law balance was, however, to be illustrated by the next social security case to come before the Court.

Case 24/64 (Dingemans)<sup>(78)</sup> concerns both Annex B, as did 100/63, and Annex F, which relates to Article 24 of the Regulation. Article 24 classifies disablement benefits for the purpose of aggregation as being either of type A (where the amount of the benefit



is independent of the period of contribution) or of type B (where the opposite is true). Annex F then lists the laws of the member states as being either type A or type B. A new law governing disablement pensions (DWI) came into force in the Netherlands in 1963. No one appears to have disputed that DWI was in fact of type A, but it was notified as being of type B, and this notification was published in the Journal Officiel. The Centrale Raad van Beroep pertinently asked whether DWI should be treated as being of type A or of type B.

This presented the Court with a dilemma. On the one hand, if it accepted the member State's manifestly incorrect classification of DWI, would this not be doing just what it had said in 100/63 that it could not do: allow a member state to "disposer arbitrairement du champ d'application" of Regulation No. 3? On the other hand, if the Court were not to accept this classification of DWI, it would mean both interpreting national law (which it has no competence to do under Article 177) and ignoring the fact that Article 24 recognises the right of member states to classify their own legislation.

Faced with this problem, the Commission counselled the first solution: to say that DWI was of type A. But the Advocate General (Gand) and the Court refused to take this step. Although the Court repeated its earlier decision on Annex B - for this was also in issue - it did not really face up to the problem of Annex F. It merely noted that the amendment to Annex F published in the Journal Officiel after the entry into force of DWI had classified the Dutch disablement legislation as being of type B; and that the regularity of this amendment had not been contested.

The decision is not entirely satisfactory, for it is difficult to see how the amendment could effectively have been contested; it

also seems to leave a situation where failure to notify matters nothing, whereas incorrect notification is of some effect.

(iii) Effect of the Court's interpretation

For the sake of clarity, the structure and principles of Regulation No. 3 were considered under various headings. It is convenient to adopt the same headings in examining the substance of the Court's interpretation of the regulation: scope of application; equality of treatment; conservation of acquired rights; conservation of rights in the process of being acquired. The problems of multi-lateral agreements<sup>(79)</sup> and the special administrative and jurisdictional arrangements of the regulation<sup>(80)</sup> do not require separate treatment.

The retention of these headings does not, of course, mean that all these issues have raised questions of equal interest. On the contrary, it will be seen that the most controversial and the most interesting decisions of the Court fall under the headings referring to the scope of application of the regulation and the conservation of rights in the process of being acquired.

(a) Scope of application

The Court's interpretation of the scope of application of Regulation No. 3 has been perhaps the most striking and the most important aspect of its work. It has insisted on a broad interpretation of the subject-matter covered by the regulation, both *ratione personae* and *ratione materiae*.

Differences of opinion as to the persons covered by the regulation became clear soon after its entry into force. Some countries (France

and Luxembourg) argued, on the basis of the title of the regulation that Regulation No. 3 was intended to apply only to migrant workers *stricto sensu*. The other countries argued that there was no such limitation contained in the text of the regulation, the provisions of which they applied to all "travailleurs salariés ou assimilés" who satisfied the requirements of Article 4 of the regulation and who moved from one member state to another, for whatever reason. It was not until 1962, at the 37th and 38th sessions of the Commission administrative<sup>(81)</sup> established by Article 43 of the regulation, that the member states unanimously agreed upon the broad interpretation of Regulation No. 3.

Despite the agreement of the member states, the Court was called upon to pronounce upon the issue a number of times. In the very first social security case (Unger, Case 75/63)<sup>(82)</sup>, the Court implicitly accepted the agreement in the Commission administrative by its interpretation of Article 19, Regulation No. 3 in a case involving a woman on a visit from the Netherlands to see her parents in Germany. In Case 33/64 (Van Dijk)<sup>(83)</sup>, the Court was asked whether Regulation No. 3 applied to a Dutchman working in Germany who was injured while spending his leisure hours in the Netherlands: the Court replied in the affirmative. This interpretation was directly challenged in Case 44/65 (Hessische Knappschaft c. Singer)<sup>(84)</sup>. In that case, which involved a German holiday-maker killed in a road accident in France, one of the parties argued that the broad interpretation of Regulation No. 3 was incompatible with the provisions of Article 51 which only gave the Council power to draw up regulations to ensure the free movement of workers. The Court brushed this objection aside by referring to the "spirit" of Article 51:



"qu'il ne serait pas conforme à cet esprit de limiter la notion de "travailleur" aux seuls travailleurs migrants stricto sensu ou aux seuls déplacements relatifs à l'exercice de leur emploi; que rien dans l'article 51 n'impose de telles distinctions, qui d'ailleurs seraient susceptibles de rendre l'application des règles envisagées impraticable; que, par contre, le système adopté pour le règlement No. 3, qui consiste à supprimer, autant que possible, les limites territoriales de l'application des différents régimes de sécurité sociale, correspond bien aux objectifs de l'article 51 du traité"<sup>(85)</sup>

This interpretation was finally confirmed some years later in the extreme case of a Luxembourger, living and working in Luxembourg, who was killed in a car crash just across the border in Belgium on an evening's outing (Case 27/69, Caisse d'entr'aide)<sup>(86)</sup>. Asked whether Regulation No. 3 applied where what was involved was not migration for employment but "une randonnée de plaisir", the Court replied that the regulation applied

"à tout travailleur salarié ou assimilé placé dans l'une des situations à caractère international prévues par ledit règlement, ainsi, qu'à ses survivants"<sup>(87)</sup>

This insistence on the broad interpretation of Regulation No. 3 is probably the most important single contribution the Court has made to the development of the international co-ordination of social security. In these days of expanding tourism the number of people who can potentially benefit from the application of the regulations is enormous.

This development is reflected in the title of the new Regulation 1408/71. Whereas Regulation No. 3 was said to concern "la sécurité sociale des travailleurs migrants", Regulation 1408/71 is "relatif à l'application des régimes de sécurité sociale aux travailleurs salariés et à leur famille qui se déplacent à l'intérieur de la Communauté".

The Court has also sought to widen the protection afforded by Regulation No. 3 by a generous interpretation of the phrase "travailleurs salariés ou assimilés" contained in article 4 of the regulation which defines its scope *ratione personae*. The first interpretation of this provision was in Case 75/63 (Unger)<sup>(88)</sup>, where the Court held that the notion covered those who, having ceased to be employed and no longer subject to compulsory insurance, nevertheless, with the intention of returning to employment, continued to be insured voluntarily under a scheme governed by principles similar to those of the compulsory insurance. More interesting, however, are two more recent cases, those of De Cicco (19/68)<sup>(89)</sup> and Janssen (23/71)<sup>(90)</sup>.

An important problem is constituted by "mixed careers", by those who migrate and are employed in one member state, and subsequently return home to work not as an employee but in some independent capacity. The problem arises whether such workers can, if they are insured not as workers but in some separate scheme when they return home, nevertheless avail themselves of the Community regulations. Both Case 19/68 and Case 23/71 are concerned with this problem. In the former, De Cicco, an Italian national, was employed and insured as an employee for several years in Germany; later he returned to Italy, where he worked and was insured as an artisan. The question arose whether, as an artisan, he should be considered as falling within the category of "travailleurs salariés et assimilés". The Court was not competent to interpret the



status of artisans under Italian law, but it gave a definition of "assimilés" broad enough to cover Italian artisans:

"qu'une telle assimilation a lieu chaque fois que, par l'effet d'une législation nationale, les dispositions d'un régime générale de sécurité sociale sont étendues à une catégorie de personnes autres que les salariés visés par le règlement No. 3, quelles que soient les formes ou modalités utilisées par le législateur national; que les artisans doivent dès lors être considérés comme assimilés aux travailleurs salariés dans la mesure où ils sont, en vertu des dispositions d'une législation nationale, protégés contre un ou plusieurs risques organisés au bénéfice de la généralité de travailleurs"<sup>(91)</sup>.

The problem arose again in the case of Janssen (Case 23/71), who had worked and had been insured as an agricultural employee in France, before returning to his native Belgium. In Belgium, he worked as an "aidant", i.e. as a family helper on his father's farm and was insured as an "independent" or self-employed worker. Again, the question arose whether he could benefit from the provisions of Regulation No. 3, whether "aidants" were to be considered as falling within the category of "travailleurs salariés et assimilés". Both the Commission and Roemer, the Advocate General in the case, advised the Court to give a negative reply.

The Court's decision provides a good example of its resourcefulness. On the one hand, it gave an interpretation of "assimilé" which, although broad, does not appear in fact to have covered the legal position of the "aidant" under Belgian law. Having interpreted the notion of "assimilé",



the Court nevertheless went on to hold that Janssen was covered by Article 4 of Regulation No. 3 by virtue of the fact that he had been insured as an employee. What follows this illustrates the use to which the Court puts its teleological approach:

"Attendu que le but des articles 48 à 51 ne serait pas atteint mais méconnu si les périodes d'assurance acquises par le travailleur conformément à la législation d'un Etat membre, devaient être pour lui perdues lorsque, profitant de la libre circulation qui lui est garantie, il change de lieu de travail et est ainsi soumis à un régime de sécurité sociale d'un autre Etat membre; que cette conclusion est d'ailleurs confirmée ... par l'article 9 & 1 du règlement No. 3 ..." <sup>(92)</sup>.

There follows a broad interpretation of Article 9 (1) which leads the Court to the conclusion that, where (as in the Belgian case) the legislation governing the insurance of independent workers allows periods of insurance completed under the social security scheme for employed workers to be taken into account in assessing the insured's right to benefits, such periods of insurance completed in another member state must be treated as having been completed in the first member state. The effect of this decision is to bring the worker who has had an international "mixed career" into the same position as the worker who has had a "mixed career" within one member state, no matter what the precise insurance status of the non-employed part of the career.

The Court's contribution to the definition of the material scope of application of the Regulation has been scarcely less positive. It has insisted that it applies equally to contributory and non-contributory schemes <sup>(93)</sup> and to voluntary as well as compulsory insurance <sup>(94)</sup>

provided, of course, that the scheme is governed by some "legislation" in the sense of Article 2 and 1(b) of the Regulation. In Case 61/65 (Vaassen-Gobbels)<sup>(95)</sup>, it was held that this term was broad enough to cover regulations governing private law insurance institutions (in this case the Beambtenfonds voor het Mijnbedrijf) when those regulations either take the place of, or complement the laws and statutory regulations which set up a general or special social security regime. This interpretation corresponded, said the Court, to the obvious desire of Regulation No. 3 not to exclude from its coverage the regimes run by private institutions which constitute, in some countries, an important part of the social security system. Lyon-Caen sees this decision<sup>(96)</sup> as paving the way to a possible extension of Regulation No. 3 to cover complementary social security schemes, or at least those schemes which have their origin in collective agreements and are in some way ratified or made obligatory by public authority. But the Court did not have the opportunity to develop this line in any of the later cases on Regulation No. 3, and Article 1 (j) of the new Regulation No. 1408/71 specifically excludes such schemes from its coverage. Moreover, in case 80/70 (Defrenne)<sup>(97)</sup>, where the question arose whether social security benefits could be considered as indirect remuneration within the meaning of Article 119 EEC, the Court makes a clear distinction between statutory schemes, whether general or special, and complementary schemes which result from collective bargaining. The problem of co-ordinating complementary social security schemes remains therefore one of the principal lacunae in the system instigated by the EEC.

One of the most interesting and important cases in this area is the case of Frilli (Case 1/72)<sup>(98)</sup>, which concerned the distinction between "social security" in the sense of the regulation and "social assistance", which is excluded by Article 2 (1) (c) from the scope



of application of the regulation. The subject of dispute in the case was the "revenu garanti", the non-contributory pension granted by the Belgian state under a law of 1969 to all old people who satisfy a means test, and who are of Belgian nationality. Mme Frilli, an Italian national who had been employed for a short time in Belgium and was resident there, claimed that the nationality restriction was incompatible with the provisions of Regulation No. 3, since the "revenu garanti" was a non-contributory pension. The Belgian state, on the other hand, argued that the aim of the "revenu garanti" was to provide "un minimum vital" to old people in need and that it was a form of assistance, and therefore not covered by the regulation. Against this, both the Commission and the Italian government argued that:

"les critères distinctifs classiques d'une prestation d'assistance sociale, à savoir l'étendue de son champ d'application, les conditions de ressources auxquelles est subordonné son octroi ainsi que son mode de financement, ne seraient plus suffisants"<sup>(99)</sup>

The important question, they argued, was whether the claimant had a legal right to the benefit, or whether it depended on the discretion of the institution granting it.

The Court, however, refused to draw a clear distinction between social security and social assistance: legislations such as the one in question were related to both categories "échappant ainsi à toute classification globale". Instead, the Court made a personal distinction between those beneficiaries who already had some right to a pension and those who did not:



"que, compte tenu de la définition large du cercle des bénéficiaires, une telle législation remplit, en réalité, une double fonction, consistant, d'une part à garantir un minimum de moyens d'existence à des personnes placées entièrement en dehors du système de sécurité sociale et, d'autre part, à assurer un complément de revenu aux bénéficiaires de prestations de sécurité sociale insuffisantes"<sup>(100)</sup>.

In the case of the latter, the "revenu garanti" merely represented a supplementary pension and so fell within the scope of Regulation No. 3, whereas those who had no right to a pension could not be helped in the absence of some "intervention législative de la Communauté".

This decision is of considerable importance, for the idea of guaranteeing a minimum pension to old people has been gaining ground in many of the member states in recent years, and much of the modern "assistance" legislation in fact grants "supplementary benefits" to those whose social insurance benefits are insufficient<sup>(101)</sup>.

(b) Equality of treatment

The problem of discrimination against non-nationals has not caused very much difficulty in any of the social security cases which have come before the Court. As we have just seen, the Court refused in the Frilli Case (1/72) to accept the discrimination against non-Belgians contained in the Belgian law on the "revenu garanti". The Court referred in that case to

"la règle d'égalité de traitement qui est l'un des principes fondamentaux du droit communautaire, consacré en la matière, par l'article 8 du règlement No. 3."<sup>(102)</sup>.

The principle of equal treatment was reasserted in the more recent case of Smieja (Case 51/73)<sup>(103)</sup>. In that case the question arose whether Miss Smieja, a German national who had been insured in the Netherlands but was now resident in Germany, could benefit from certain transitional provisions under the Dutch old age pensions law (AOW), when Article 44 of that law restricts the benefit of those provisions to those who "(a) possess Dutch nationality and (b) reside within the Kingdom". The Court held, in effect although not, of course, in form, that neither of these restrictions could be opposed to Miss Smieja's claim: under Article 8, Regulation No. 3 (and under Article 3 (1), Regulation No. 1408/71), Miss Smieja must be treated as a Dutch national, and under Article 10 (1), her acquired pension rights could not be reduced simply because she resided in another member state<sup>(104)</sup>.

(c) Conservation of acquired rights

The Court has been no more tolerant of residence restrictions than it has been of nationality restrictions. Although it does not emerge very clearly from the text of Regulation No. 3, the Court has insisted that the general rule is that residence restrictions are incompatible with the Regulation.

In the Vaassen-Gobbels case (61/65)<sup>(105)</sup>, an apparent gap in Regulation No. 3 was discovered. Although provision had been made that residence should be no bar to the provision of medical care in the case of active workers (Article 12), nor in the case of pensioners where the pensioner is automatically insured against illness (cf. Articles 10, 12, 22), no provision had apparently been made for pensioners whose health insurance was independent of their pension. However, the Court,



emphasising the deterritorialising aspect of Regulation No. 3, held that it resulted from Article 10 of the Regulation (which applies to "les pensions ou rentes et les allocations au décès", a phrase which does not, one would have thought, cover the provision of medical care) that, where Regulation No. 3 intends to preserve residence restrictions, it does so expressly. The "dispositif" of the judgment is unusually and no doubt deliberately vague, referring not to particular provisions, but simply saying that "les dispositions du règlement No. 3 s'opposent à ..." residence restrictions like that in question. But, however faulty the reasoning, the result of the case is surely most welcome<sup>(106)</sup>.

**(d) Conservation of rights in the process of being acquired:**

More than anything else, it is the intricacies of the system of aggregation and proratisation which have caused difficulties for the Court and the problem has come before it more than twenty times<sup>(107)</sup>. We shall look first at the application of the system to non-contributory schemes, secondly at the more controversial aspect of the Court's "jurisprudence", the relation which it has seen between aggregation and proratisation.

When discussing the techniques of aggregation and proratisation<sup>(108)</sup>, we saw that they were designed primarily for contributory social security schemes and were not particularly suitable where one of the systems is non-contributory. Hence the introduction in the Netherlands of non-contributory pensions for widows and orphans<sup>(109)</sup> and for invalids<sup>(110)</sup> was bound to cause some problems. Nevertheless, the Court confirmed in case 100/63 (Van der Veen) and 24/64 (Dingemans) that Regulation No. 3<sup>(111)</sup>



and its system of aggregation and proratisation did indeed apply to these new schemes<sup>(112)</sup>.

What this actually means was made a little bit clearer by the judgment in the Hagenbeek case (4/66)<sup>(113)</sup>. Normally, as we have seen, the technique of aggregation means simply the addition of periods of insurance in order to overcome preliminary periods, the completion of which is a condition precedent to the granting of benefits. But where, as in the case of the Dutch survivors' pension, there is no preliminary period required and the only condition is that the insured person should be subject to the Dutch system at the time of his death, the mere addition of periods of insurance means nothing. In Hagenbeek, however, the effect of the Court's decision was that, where a person has been insured in the Netherlands, but is no longer insured there at the time of the realisation of the risk (i.e. at the time of his death, if we are considering his survivors' pension), aggregation operates to recover his (survivor's) pension rights. Séché<sup>(114)</sup> is surely right in pointing to this as a modification in the notion of aggregation, which here involves not simply an arithmetical addition of periods of insurance, but the principle that if some event, which is essential for the opening of social security rights in one member state, occurs in another member state, then it must be treated as though it had occurred in the first state.

But it is on the question of the proper relation between aggregation (Article 27, Regulation No. 3) and proratisation (Article 28, Regulation No. 3) that the Court's "jurisprudence" has been particularly controversial and troublesome. The fact that it is the Court's teleological approach, its insistence on the aims of the Regulation, that is at the source of the troubles, gives the study of these cases a more than technical interest.

When we discussed the social security problems which faced the migrant worker in the absence of international co-ordination, we noted that, despite the problems, he might be lucky (or skilful) and benefit from two (or even more) full pensions<sup>(115)</sup>. We shall retain the most obvious example; a man works in Germany for, say, forty years, then goes to the Netherlands and works for one year and dies. His widow will receive a German pension corresponding to the forty years' insurance of her late husband and, as we have seen, she will also receive a Dutch pension<sup>(116)</sup>, for the only condition required is that the insured person should die while resident in the Netherlands. In the absence of international co-ordination, the migrant's widow will, in this case, be better off than either the widow of a man who had worked all his life in Germany, or the widow of a man who had spent his whole career in the Netherlands. We saw also that the aim of international co-ordination is to ensure that the migrant is covered by social security, but only once, that is, to put him in the same position as a non-migrant. If the co-ordinating arrangement succeeds in this aim, clearly it will be to the disadvantage of our widow. But we know already from our examination of the Court's view of the aims of Regulation No. 3 that it considers that the main aim of Regulation No. 3 and Article 51 EEC is to ensure the free movement of workers and that any reduction in the rights of the migrant would be contrary to that aim. How can this be reconciled with the traditional view that it is wrong for our widow to enjoy two pensions? It is from this contradiction that much of the thorniest litigation before the Court has sprung.

Now, the traditional idea of aggregation and proratisation is that each country should conduct the operation separately: first, each country in which the migrant has worked calculates the pension which



would have been due to him had he completed the entire period of insurance in that country; then each country divides the resulting sum in proportion to the period of insurance actually completed in that country. Thus, in the case of our widow's pension, each country, Germany and the Netherlands, will calculate the amount which she would have received had her husband been insured under their legislation for 41 years: Germany will then pay her  $40/41$  of the sum which they calculate, and the Netherlands will give her  $1/41$  of the sum which they, for their part, calculate. Now, if the amount of the pension in each country were directly proportional to the period of insurance<sup>(117)</sup> the pension which the widow would receive would be exactly the same as that which she would have received in the absence of international co-ordination. But where the amount of the pension does not increase at the same rate as the period of insurance, that is, in the not infrequent case where there is either a fixed minimum or a flat rate pension (as with the Dutch survivors' pension), the amount which the migrant receives after aggregation and proratisation may be less than the amount which he would have received if no such operations had been conducted. In our own particular case, this means simply that, although the widow will receive the same German pension as she would have received in the absence of international arrangement, she will receive only  $1/41$  of the Dutch pension she would otherwise have received, since that pension is flat-rate and dependent only on residence.

The solution to this problem which was adopted by most post-war treaties is to grant the migrant the possibility of opting between the application of the treaty and the application of the two separate national laws. This would, of course, suit our widow very well - she would presumably opt for the separate application of the two laws.



However, for those who regard the aim of international co-ordination as being to rationalise the system, so that a migrant neither loses nor gains by migrating, it is an unsatisfactory solution. No doubt because this rationalising, deterritorialising influence is an important force in the attempt to construct a united Europe, Regulation No. 3 adopted a different solution, i.e. Regulation No. 3 does not provide for any right of option. Article 28(3) provides that, where the pension to which a migrant (or, of course, his widow) is entitled after aggregation and proratisation is smaller than the pension which he would have received under the legislation of one of the member states, had there been no aggregation, then he has a right to a complement equal to the difference.

This would mean, in the case of our widow, that if the sum she would receive after aggregation and proratisation (40/41 and 1/41 respectively of the German and Dutch pensions to which she would have been entitled after 41 years) were less, say, than the German pension she would otherwise have received (an unlikely event), then she is entitled to a complement equal to the difference. In other words, if a migrant loses on aggregation and proratisation, the most he can possibly receive, even after the application of Article 28(3), is the higher of the two pensions to which he was entitled in the absence of international regulation. There is no right of option: Article 28(4).

On the face of it, then, there are some migrants, like our widow, who will not benefit but will lose from the application of Regulation No. 3, who would be in a better position if Regulation No. 3 did not exist. This is the problem which faced the Court of Justice.

It was against this background that the Dutch Centrale Raad van Beroep (the highest Court in social security matters) asked the Court

in case 100/63 (Van der Veen)<sup>(118)</sup> whether proratisation under Article 28 applied to AWW (the Dutch law governing widows' and orphans' benefits), even where there was no question of aggregation "en vue de l'acquisition, du maintien ou du recouvrement du droit aux prestations" under Article 27 (1), Regulation No. 3, i.e. whether the technique of proratisation should be applied even where - as in the case of our hypothetical widow - no aggregation under Article 27 was necessary to open the widow's right to a pension. The Court replied that Article 27 and 28 were applicable to legislations such as the AWW, but that Article 28 (proratisation) was applicable only when Article 27 was applicable, only

"s'il s'agit de l'acquisition, du maintien ou du recouvrement du droit à prestation, visés à l'article 27"<sup>(119)</sup>.

If Article 28 could be applied independently of Article 27, the Court argued, migrants might suffer a loss of rights and this would be incompatible with the aim of Article 51 to favour the free movement of workers.

The lack of clarity of this decision gave rise to a flood of litigation. There were two possible interpretations, each of which was a break with the traditional approach:

- (1) It was clear that the Court meant that there should be neither aggregation nor proratisation where the former was not necessary for the purpose of acquiring, maintaining or recovering rights in either country. This would mean that in case of our widow, there would be no application of Regulation No. 3, since she was already entitled to a pension in each country under internal law.



- (2) It was also clear that if aggregation were necessary for the purpose of acquiring, maintaining or recovering rights in a country, proratisation under Article 28 should also be applied in that country.
- (3) What was not clear was whether Article 27 and 28 should be applied in both countries if aggregation was only necessary in one. For example, if a migrant works for four years in Germany and then the rest of his career in the Netherlands, then aggregation will be necessary to open his widow's right to a pension in Germany (where the preliminary period required is 15 years), but not in the Netherlands. Should the Dutch pension also be proratised in this case? The traditional answer is a clear yes.

The confusion which followed is well illustrated by the decisions of the national courts. The Centrale Raad van Beroep assumed that the Court meant that proratisation should take place in all the countries concerned if aggregation were necessary in one of them, and it applied this assumption to the Van der Veen cases<sup>(120)</sup>. In another case, a rather extraordinary decision, the Raad van Beroep te Zwolle<sup>(121)</sup> held that the Court's decision in Van der Veen meant that proratisation applied only in the country in which aggregation was necessary, and that, although this interpretation of Article 28 was manifestly contrary to the intention of the authors of the Regulation and would cause a number of circularities, it was nevertheless an authoritative interpretation and should be followed. On appeal, The Centrale Raad van Beroep disagreed with this interpretation of case 100/67 (Van der Veen) and quashed the lower court's decision.



Surprisingly, the Centrale Raad, which is usually very ready to send preliminary questions to the Court of Justice under Article 177 EEC, does not even seem to have considered doing so in this case.

These doubts as to the proper interpretation of Article 28 were further increased by the decision in Hagenbeek (4/66). In that case, the Court introduced an "attendu"<sup>(122)</sup> which was not strictly necessary for its decision: it pointed out that, although Article 51 EEC would not allow a worker to be deprived of his rights by the fact of his migration, this does not mean that he may receive an accumulation of benefits which would be unjustified in the light of Article 28(3) Regulation No. 3. This seemed to indicate a shift in the Court's interpretation. In the light of all this, it is not surprising that the national social security institutions were reluctant to abandon what had seemed the obvious interpretation of Article 28 Regulation No. 3 before the judgment in Van der Veen. The reluctance of the national social security institutions led in turn to a wave of litigation, part of which hit the Court of Justice in 1967.

In the first of the 1967 cases, Ciechelski (1/67)<sup>(123)</sup>, the Court cleared up some of the doubts which surrounded the Van der Veen decision. The Cour d'Appel d'Orléans asked the Court what the proper interpretation of Article 51 EEC and Article 27, 28 Regulation No. 3 was, and, in particular, whether the Regulation could validly deprive a worker of a part of the rights which he had already acquired in one of the states of the Community. The Court, taking a different approach from that of the Commission and the Advocate General (Gand in this case), held:

- (1) That there should be no proratisation unless aggregation was necessary for the purpose of acquiring, maintaining or recovering rights under the legislation in question. This conclusion was seen to result from the text of Article 27 (1) and Article 28 (1) (b) and to be supported by the aim of Article 51 which is to favour the migrant worker "par rapport à la situation qui résulterait pour lui de l'application exclusive du droit interne" (124) Moreover, Regulation No. 3 does not aim to create one common social security system, but leaves the different systems intact.
- (2) That these principles do not apply where this would lead to an accumulation of benefits relating to the same period. But there is no such accumulation simply by the fact that the insured maintains his rights in one country while obtaining through aggregation a new right to a benefit in another state, even where the sum gained in the latter by aggregation is greater than the loss that would be caused by proratisation in the former.

This decision thus rejects the traditional interpretation of the technique of aggregation and proratisation, according to which the proratisation should be carried out in both countries if necessary in either. The decision reiterates the principle that any interpretation of Regulation No. 3 which would put the migrant in a position less favourable to him than it would be in the absence of the Regulation would be incompatible with the aim of Article 51. As in the case of *Duffy* (125), the Court's rejection of the Commission's argument represents the rejection of the aim of "rationalising"



the co-ordination of the social security systems in favour of the aim of safeguarding the rights of migrants. The decision was confirmed by two other decisions of the same day, the judgments in Cases 2/67 (De Moor) and 9/67 (Colditz).

Grave doubts have been raised as to the correctness of these decisions. Voirin, in particular, has argued cogently against them<sup>(126)</sup>. It is worth considering some of his objections, for in this apparently very technical dispute we can see some of the basic ideas as to the purpose of Regulation No. 3 working their way out of theory and crystallising into reality.

After pointing out that the Court's interpretation of the technique of aggregation and proratisation is contrary to the traditional view of those techniques and to the apparent intentions of the authors of the Regulation, his principal arguments are: firstly, that the Court's decision conflicts with the text of Regulation No. 3, seen as a whole; and secondly, that this decision against the text was in no way required by the aims of the Treaty.

It would be difficult to deny that the Court would have been bound to come to a different result if they had given more weight to the text of Article 28 and of Regulation No. 3 and Regulation No. 4 as a whole, instead of immediately averting their gaze to the "spirit" of Articles 48-51 EEC. The Court's decision deprives at least three provisions of all meaning: Article 28 (1) (f), 28 (3) and 28 (4) of Regulation No. 3<sup>(127)</sup>. Article 28 (1) (f) provides that if the claimant does not, after aggregation, satisfy the requirements of all the legislations applicable but does, without aggregation, satisfy the requirements of one legislation, the benefit will be calcu-



lated according to that legislation; Article 28 (4) provides that this (the eventuality mentioned in Article 28 (1) (f) is the only case in which a claimant may claim a pension on the basis of the provision of a single legislation. These provisions make sense only if one assumes that, where a claimant is entitled to pension in one state without aggregation and to a pension in another through aggregation, both pensions must be proratised. The same is true of Article 28 (3), Regulation No. 3, which provides, as was seen already, that, where the pension to which a migrant is entitled after aggregation and proratisation is smaller than the pension which he would have received under the legislation of one of the member states had there been no aggregation, then he has a right to a complement equal to the difference: such a situation cannot, of course, arise under the Court's interpretation of the relation between Article 27 and Article 28. The Court's interpretation in the Ciechelski and De Moor cases is one which shows scant respect for the text of the regulations.

However, the second part of Voirin's argument, to the effect that a departure from the traditional interpretation of Regulation No. 3 is in no way required by the aims of Articles 48-51 EEC, appears to rest on his claim that Regulation No. 3 was elaborated "dans la double perspective de la suppression des discriminations et de la réalisation de la liberté de circulation ... Les deux objectifs sont d'ailleurs liés, que la discrimination joue en faveur ou en défaveur du migrant"<sup>(128)</sup>. We have seen already that this view is not shared by the Court, which has insisted from the beginning that Regulation No. 3 must not operate to the detriment of the migrants.

The difference in view on this point between Voirin (who represents more or less the viewpoint of the Commission and of the Advocate General) on the one hand, and the Court on the other, betrays different attitudes towards the function of law, of social security, of Regulation No. 3 and, by implication, of the European Communities.

Voirin clearly considers the text of the law to be of prime importance and regards an interpretation which goes against this text with a certain abhorrence as a "procédé qui paraît bien étranger à la tradition juridique des six Etats membres"<sup>(129)</sup>.

We must assume that the Court's approach is different, for although the considerable textual arguments were raised before it, particularly by Roemer, the Advocate General, in De Moor, it did not even mention them in its judgments, preferring to concentrate on the aims of Article 51<sup>(130)</sup>. Surprisingly, it did not even take the opportunity offered to it in De Moor (where the question concerned the validity of Article 27, 28 Regulation No. 3) to declare invalid those provisions of Article 28 which conflict with its view of the aims of Article 51. The Court appears to be taking a broad, creative view of the law and shuns detailed analysis of texts.

It is more difficult to see whether the decision involves a certain concept of social security. Voirin assumes that the Court's reasoning is governed by the outdated and socially undesirable notion that social security is governed by the same principles as private insurance, so that an accumulation of social security benefits would be no more repugnant than an accumulation of benefits resulting from several policies of life insurance. But, if this is the way in which the Court reasons, it is nowhere expressed in the Court's judgments,



nor is it a necessary step in the argument, once one accepts the Court's definition of the aims of Regulation No. 3. On the other hand, Voirin's own assumption<sup>(131)</sup>, that a non-contributory pension based on residence is nevertheless the counterpart of the work done during a professional career, suggests that his reasoning is not uninfluenced by the contractual origins of social security.

The most striking contrast, and one to which we have already drawn attention, is that between the two views of the aims of Regulation No. 3 and, by implication, the aim of the European Communities. The Court, although its "jurisprudence" is much influenced by the idea of removing nationality and residence restrictions, does not allow this idea to interfere with what it considers to be the more immediate aim of securing the rights of migrants. Perhaps it is legitimate to extrapolate and suggest that the Court thinks of European integration more in terms of empirical, practical objectives, whereas those like Voirin or the Commission, for whom the accumulation of social security benefits is as abhorrent as the loss of all benefits, see integration more in terms of principle; if the important principle is that the "irrational" effects of the fragmentation of Europe should be removed, then it matters but little whether those effects be advantageous or disadvantageous to the person concerned.

There is much to support Voirin's criticism of the Court's decisions on Article 27 and 28. Uncertainty remained as to the proper application of these articles, and indeed there is something unsatisfactory in the fact, say, that the pension of a migrant who works both in Germany and the Netherlands may be greatly affected by the direction in which he moves. But with the reservation that it ought to have dealt more explicitly with the textual arguments, the Court's defence of the migrants' rights is surely to be welcomed. Moreover, if the



European Communities can be seen to offer direct advantages to individuals who come into touch with them, is this not likely, in the long run, to benefit the European construction, however irrational it may appear?

The Court itself was content to maintain its interpretation in later cases, though it is forced to admit one exception to the rule. In the next case of interest following the judgments of 5.7.67, Goffart (Case 22/67)<sup>(132)</sup>, the Court is asked to interpret Article 28 (1) (f). The case is curious, for the Court both confirms its earlier interpretation of the relationship between Article 27 and Article 28 and also interprets the provisions of Article 28 (1) (f) which its former decision had rendered redundant; yet at no point does the Court actually point out that Article 28 (1) (f) is redundant. The Court's view on the interdependence of aggregation and proratisation is again repeated in Case 11/67 (Couture)<sup>(133)</sup>, but in the "dispositif", it is accompanied by an obscure reservation: this rule applies "tout au moins dans le cadre de ceux des systèmes à périodes où la pension de retraite varie uniquement en fonction des périodes d'assurance accomplies"<sup>(134)</sup>.

This reservation is repeated in the next case, Guissart (Case 12/67)<sup>(135)</sup>. Moreover, the Court was forced to admit an exception to the general rule it had elaborated:

"attendu cependant que la complexité des problèmes posés par la coordination des législations nationales empêche d'ériger l'interprétation ci-dessus dégagée en principe absolu";<sup>(136)</sup>

It went on to say that the general rule could lead to an unjustified

accumulation of benefits relating to one and the same period, where, as in this case, periods of insurance actually accomplished in one country, were nevertheless fictively presumed by the legislation of another country to have been accomplished in that country. In this case the problem arose from transitional arrangements under a Belgian law of 1957, according to which non-manual workers ("employés") reaching pension age before the end of 1961 and who were insured for 12 of the preceding 15 years were deemed to have been insured in Belgium for 45 years. In fact Guissart, who fulfilled these conditions, had been insured in Luxembourg for 18 of the 45 years and was entitled to a Luxembourg pension without any need for aggregation under Article 27. In this case, unlike our hypothetical case of the German/Dutch widow, it was possible in argument to define a period and say that Guissart would receive two pensions relating to that period. In such a case, said the Court, it must be legitimate for the country by which the fictional periods are taken into consideration, to subtract from this fictional period the real period of insurance accomplished in the other country, without this subtraction being considered contrary to the aims of Article 51 EEC. But, in the absence of Community provisions, it was up to the country concerned to decide how and whether to make the subtraction.

This was the last of the 1967 series of judgments which considerably modified the accepted interpretation of Articles 27 and 28. But some social security institutions were reluctant to accept the Court's interpretation, and the question arose again in three cases (Gross, Keller, Höhn, Cases 26/71, 27/71, 28/71)<sup>(137)</sup> sent to the Court in 1971 by the Commission de première instance du Contentieux de la Sécurité Sociale et de la Mutualité sociale agricole du Bas-Rhin.



The French tribunal phrased its question rather provocatively, asking the Court in each of these cases "to say whether, notwithstanding the law in force (Articles 27 and 28 of Regulation No. 3 and Article 51 of the Treaty of Rome), migrant workers must have a privileged situation in relation to nationals of the country in which they are working". The fact that the Court was being asked to pronounce yet again on the question and the tone in which the submissions of the social security institution involved (the Caisse régionale de Strasbourg) were drawn up provoked an unusual expression of annoyance from the Advocate General in the case, M. Dutheillet de Lamothe:

"Le ton de ce document (i.e. the submissions of the Caisse régionale), le manque d'informations sur les règlements communautaires et sur votre jurisprudence dont il paraît procéder font que nous avons hésité à vous en parler autrement que pour l'écarter sans discussion en rappelant seulement le vieux proverbe de notre province d'origine: "Le curé perd son temps à dire deux fois la messe pour les sourds" (138)

The Court, however, showed more patience and repeated its decision in the Ciechelski case, emphasising that, if certain unwarranted advantages resulted for the migrant, this was the consequence of the system of co-ordination rather than of its interpretation of that system (139).

Although the textual arguments relating to Article 28, Regulation No. 3, were again raised by the Caisse régionale (140), the Court did not deal with them explicitly in its judgments.

One would have thought that this would be the end of the matter, but the question arose once again in Case 191/73 (Niemann) (141). The question of the compatibility of Article 28 (3), Regulation No. 3, with Article 51 of the Treaty was raised, and the Court, repeating its

earlier interpretation, at last concluded explicitly that this provision is "incompatible with Article 51 and moreover devoid of any purpose"<sup>(142)</sup>.

It seems unlikely that the Court will be called upon again to repeat its interpretation of Articles 27, 28, Regulation No. 3<sup>(143)</sup>, but the matter is far from closed, for, as we shall see, it is almost certain that the corresponding provisions of Regulation No. 1408/71 will raise as much, if not more, difficulty<sup>(144)</sup>.

(e) Choice of law:

This is another area in which the Court's teleological approach has prompted it to discard traditional interpretations in a manner calculated to shock "les juristes respectueux du Droit strict"<sup>(145)</sup>. But it has already been described<sup>(146)</sup> how the Court was led by its view of the aims of Regulation No. 3 and of the proper balance between Community and national law to conclude, in the Nonnenmacher (92/63) and Van der Vecht (19/67) cases that Article 12 does not exclude the application of laws other than that of the place of work, provided the result is not to subject either worker or employer to the obligation to finance a system which grants them no additional social protection. This abandons the view, which had generally been accepted until then, put forward by both the Commission and the Advocate General, that Article 12 is a simple rule of conflict deciding which of two laws should apply. Like Voirin in his note on the Ciechelski, De Moor and Colditz<sup>(147)</sup> cases, Lyon-Caen too, in a comment on Nonnenmacher, criticises the Court's lack of respect for the text of Regulation No. 3: "invoker le principe de l'article 51 du traité pour écarter un article précis du règlement no. 3, cela peut choquer certains principes d'interprétation juridique. Invoker la libre circulation des travailleurs pour mettre



de côté un texte précisément inscrit dans le règlement destiné à faciliter cette libre circulation, est un peu rapide comme raisonnement<sup>(148)</sup>.

The concrete application of these provisions (i.e. of Article 12 and of Article 13, which provides exceptions to the general rule) to the many sorts of employment relationship and international activity which arise in practice has been the source of some difficulty, and the Court has been asked several times<sup>(149)</sup> to define more closely the rules which determine the choice of law. These cases, although difficult, have not aroused any major controversy and need not detain us here.

#### (iv) Conclusion

Within what it considers to be its proper competence vis-a-vis national law, the Court has, with but few aberrations<sup>(150)</sup>, consistently interpreted the social security regulations in the light of the aims of Article 51 EEC. It considers that the principal aim of this Article is to establish the greatest possible freedom of movement of workers; that the fulfilment of this aim involves the elimination of legislative barriers which cause disadvantage to migrants; but that it follows from the principal aim that the removal of national barriers may not operate to the detriment of migrants.

The Court's view of the aims of Article 51 has led it to give a very generous interpretation of the scope of application of Regulation No. 3, and an unexpected twist to the provisions concerning aggregation and proratisation, choice of law and the role of bilateral treaties under Article 52, Regulation No. 3. The weight which it attaches to its teleological approach, to the subordination of the Regulations to what it considers to be the aims of Article 51 EEC, has often caused it

to overlook the actual text of the regulations.

Although the Court's decisions have sometimes caused dismay to the specialists in social security law, one has the impression not of a non-specialist blundering awkwardly into a very technical field of law, but of a Court bringing a fresh approach to the subject and determined to impose its views, even if it is not aware of all the consequences<sup>(151)</sup> and even if it means pretending not to notice some of the provisions of the text.



B. The National Courts <sup>(152)</sup>

(1) Introduction

The Court of Justice is not the only Court which deals with Community law, and it would be wrong to consider the judicial treatment of Regulation 3 without also considering the case law of the national courts. Indeed it is the national courts who are primarily responsible for the application and interpretation of Community law. It is only where some problem of interpretation arises which is essential to the solution of a case that the national court has the choice (or, if it is a court of last instance, the obligation) of referring the problem to the Court of Justice before giving its decision. If we want to find the interpretation of Community law which is actually used to settle individual disputes, it is to the case law of the national courts that we must look.

Just as Regulation No. 3 has been one of the principal sources of litigation before the Court of Justice, so it has also given rise to a large number of cases before the national courts. To date, there have been over a hundred reported cases <sup>(153)</sup>, involving about 200 judgments on Regulation No. 3, more than fifty of them by courts of last instance. In view of the fact that Regulation No. 3 was designed primarily with contributory social security schemes in mind, it is not surprising that the largest number of cases have arisen in the Netherlands. There appears to have been only one reported case in Italy: this again is not surprising in view of the relatively small number of migrant workers in that country. The rest of the litigation is spread fairly evenly between France, Germany and Belgium, with a small sprinkling of cases in Luxembourg.

With so much litigation, at least in five of the six countries, there is a danger that different schools of interpretation will grow up. The normal method of countering this danger within a national system is to provide a system of appeals to a supreme court which stands in some position of authority over lower courts. But, when the Treaty of Rome was drafted, this straightforward approach was rejected in favour of the more subtle and complex procedure of preliminary references under Article 177. This procedure does not so much set the Court of Justice above the national courts; rather it tries to ensure unity of interpretation more gently, by persuading the national courts to refer their problems to the Community Court for an authoritative interpretation. It is true that courts of last instance are under a legal obligation to do so, but this obligation is not always respected, and neither the parties to the case nor anyone else can, in practice, enforce it.

To what extent does the procedure under Article 177 achieve its primary aims, that is, ensure the unity of interpretation of Community law by the national courts? What is the impact of a decision by the Court on the national "jurisprudence"? Do the courts of last instance in fact respect their obligations under Article 177? The wealth of case law on Regulation No. 3 gives us an opportunity to see how this very important aspect of the Community legal system functions in practice.

We shall look first at the interpretation by the national courts of some of the provisions which have caused most problems, both to national courts and to the Court of Justice. Then we shall see how the problems of Regulation No. 3 and recourse to Article 177 have been treated by the courts of last instance in the various countries.



(ii) The interpretation of certain articles by the national courts

(a) Articles 27, 28: These troublesome articles have arisen in at least thirty-five reported cases, in five of the member states.

We have seen already that the central problem of these two articles was to determine the proper relationship between aggregation and prorationisation, and that there were three possible views, on this problem which we shall call theories A, B and C:

A: Articles 27 and 28 apply even where aggregation is not necessary for the acquisition, maintenance or recovery of a right in either (or any) country;

B: Article 28 applies in both (or all) countries where aggregation under Article 27 is necessary in one of the countries;

C: Article 28 applies only in that country in which aggregation under Article 27 is necessary for the acquisition, maintenance or recovery of rights.

The Court of Justice, it will be recalled, excluded Theory A in its judgment of 15.7.64 in Case 100/63 (Van der Veen), but it was not until its judgments of 5.7.67 (in Cases 1/67 (Ciechelski) and 2/67 (De Moore)) that it was made quite clear that it favoured Theory C rather than Theory B. These decisions caused a certain amount of surprise and it was argued even that they were *contra legem*<sup>(154)</sup>. Because of the controversial nature of the Court's "jurisprudence" on these articles, it is particularly interesting to see the attitudes of the national courts, both before and after these decisions.

Although it was very soon realised that the application of Regulation No. 3 could be to the detriment of some migrants, particularly where non-contributory systems were involved, nobody appears to have

even thought of taking the view eventually adopted by the Court (i.e. Theory C). There were a number of ways in which even before Van der Veen (Case 100/63), it was sought to reduce the loss which migrants would have suffered from the application of Theory A. In a number of cases it was suggested that Regulation No. 3 could not be applicable to non-contributory schemes. In the Netherlands, this argument was rejected by three courts of first instance, those of Roermond<sup>(155)</sup>, Arnhem<sup>(156)</sup> and Rotterdam<sup>(157)</sup>, but the court of appeal (and of last instance), the Centrale Raad van Beroep felt sufficient doubts to send the matter to the Court of Justice<sup>(158)</sup>: this resulted in the judgments of Van der Veen (100/63) and Dingemans (24/64). In France, similar doubts were felt by the Cour d'appel de Douai<sup>(159)</sup>, but it made the mistake of sending the parties to the Commission administrative instead of the Court. The question in this case did eventually reach the Court and resulted in the judgment in Torrekens (28/68)<sup>(160)</sup>, but this slip by the court of Douai caused the parties more than five years.

In another French case, it was argued that the migrant should at least have the right of opting between the application of national legislation and that of Regulation No. 3. The Cour d'appel de Paris<sup>(161)</sup> rightly rejected this argument<sup>(162)</sup>; the court found it regrettable that the claimant should receive no benefit corresponding to his period of contribution in Italy, but could see no other solution<sup>(163)</sup>. The court obviously did not have the same views of the judicial function as the Court of Justice:

"que cette situation pour regrettable qu'elle soit, résulte de la stricte application des textes actuellement en vigueur et ne saurait être en aucune façon améliorée sur le plan judiciaire".



The problem of the relationship of Article 27 and 28 appears to have arisen in only two Dutch cases before the Court's decision in Van der Veen; in both of those, the courts (the Raad van Beroep of Arnhem<sup>(164)</sup> and Roermond)<sup>(165)</sup> held, like the Court in Van der Veen, that Article 28 applied only if aggregation under Article 27 were necessary.

After the Court's decision in Van der Veen, we notice, on the one hand, that there is a general increase in litigation and, on the other, that the problem of the relationship between Articles 27 and 28 comes more into the foreground.

The Centrale Raad van Beroep, which asked the questions in the Van der Veen case - or rather cases, for the questions asked related to ten cases before the Centrale Raad - understood from the Court's answer that Article 28 was to be applied if aggregation was necessary in any of the countries concerned (i.e. Theory B), and applied Regulation No. 3 accordingly, even in the cases involved in the Van der Veen decision<sup>(166)</sup>.

This view was disputed by the Raad van Beroep of Zwolle, a court of first instance, in two striking judgments of 15.2.66<sup>(167)</sup>, which held (correctly, as it turned out) that, although this was obviously contrary to the intention of the authors of Regulation 3 and meant that some provisions of Regulation No. 3 became unclear, the Court of Justice had, in Case 100/63, decided in favour of Theory C. On appeal, these two decisions were quashed by the Centrale Raad van Beroep<sup>(168)</sup>, which, after a thorough examination of the judgment in Case 100/63 and after setting forth the problem with great clarity, decided that RB Zwolle was wrong and that Theory B was the correct one. What is very surprising in these decisions is that the Centrale Raad

which, earlier on, had been very willing to refer problems to the Court of Justice, did not even mention Article 177, although it was quite clear that there was a problem of interpretation and that, as a court of last instance, it was obliged to refer to the Court of Justice. No doubt this apparent mental block was due in part to the fact that the consequences of a decision in favour of Theory C would be far more serious for the Netherlands than for any other country<sup>(169)</sup>. The same problem arose, though not as often and not until later, in other member states, but led almost immediately to references<sup>(170)</sup> to the Court of Justice. Within a short space of time, the Cour supérieure de Justice in Luxembourg, the Cours d'appel of Orléans and Paris and the Cour de Cassation in France, and the Belgian Conseil d'Etat all asked questions related to the same problem<sup>(171)</sup>.

The Court's decisions in Ciechelski and De Moor came on July 5th 1967, but they were not published until some time later and it was a few months before they made any impact on national judgments. As late as 4.10.67 we find the Centrale Raad van Beroep confirming a decision of RB Roermond in favour of Theory B<sup>(172)</sup>. It was not until June of the following year<sup>(173)</sup> that the Dutch court reversed its earlier jurisprudence in the light of Court's decisions, although it drew attention to the exception, of rather unclear extent, made in Case 12/67 (Guissart)<sup>(174)</sup>. The decisions appear to have been accepted with less hesitation in the other member states. The French Cour de Cassation<sup>(175)</sup>, in a judgment of 2.7.70, although it did not make express mention of the Community Court's decisions, adopted Theory C, repeating the arguments which the Court had used and rejecting arguments based more directly on the text of Regulation No. 3. The Belgian Conseil d'Etat also applied that interpretation in a decision of the same year<sup>(176)</sup>. The Court's



surprising decisions on Article 27 and 28 seem to have established themselves and to have been accepted by the national courts<sup>(177)</sup>.

As a result, the amount of litigation on these articles has decreased sharply.

**(b) Article 4**

We have seen that the Court has given a broad interpretation to the scope of applications *ratione personae* of Regulation No. 3. In its judgments of 19.3.64 (75/63, Unger) and of 19.12.68 (14/68, De Cicco) it gave a broad interpretation to the notion of "travailleur salarié ou assimilé"; and in its judgments of 19.3.64 (75/63) and, more especially, of 11.3.65 (31/64, Bertholet; 33/64, Van Dijk) and 9.12.65 (44/65, Hessische Knappschaft), it insisted that Regulation No. 3 was in no way limited to migrant workers in the normal sense of the term. Did the national courts follow this interpretation?

For some reason, the Court seems to have been less successful in moulding the jurisprudence of the national courts than it (eventually) was in the case of Articles 27 and 28. It is not surprising, perhaps, that before the decision in Unger, the decisions of the national courts<sup>(178)</sup> were too restrictive in view of the interpretation adopted by the Court. But, although the Court pointed out in its judgment of 19.3.64 in that case that the motive for which an insured person travelled to another member state did not affect the application of Regulation No. 3, it was argued in at least three Dutch cases later that year that Regulation No. 3 was limited to migrant workers *stricto sensu*. This argument was accepted by the court in one of the three cases<sup>(179)</sup>: in the other two cases, it raised sufficient doubt to prompt the court to refer the problem to the Court of Justice in the Bertholet and Van Dijk cases<sup>(180)</sup>. The judgments in these cases stated clearly that there was nothing in

Article 4 to restrict the application of Regulation No. 3 to migrant workers *stricto sensu*, yet almost three months later<sup>(181)</sup>, the French Cour d'Appel de Colmar felt sufficient doubt to ask the same question again: this led to a further confirmation of the decision in Case 44/65 (Hessische Knappschaft).

Even after this series of judgments, we find a number of courts holding that Regulation No. 3 is limited to migrant workers *stricto sensu*. But these decisions are best attributed to ignorance or simple confusion rather than to reasoned rejection of the line taken by the Court. Two courts of first instance, the Tribunale di Milano<sup>(182)</sup> and the Commission de première instance du contentieux de la sécurité sociale de Paris<sup>(183)</sup>, held that Regulation No. 3 was limited to migrant workers as defined by ILO convention No. 97. In another case, two bizarre decisions, one at first instance<sup>(184)</sup>, the second on appeal to the Cour d'appel de Colmar<sup>(185)</sup>, appear to have limited the application of Regulation No. 3 to frontier workers. Fortunately, this<sup>was</sup> corrected by the Cour de Cassation in its decision of 14.1.70<sup>(186)</sup>. Doubts were also felt in Luxembourg, where they were sufficiently strong for the Cour supérieure de justice<sup>(187)</sup> to give the Court another opportunity to confirm its earlier jurisprudence in Case 29/69. It is not clear why this question was asked by the Luxembourg court, for neither of the parties to the principal litigation disputed, in their observations before the Court, that Regulation No. 3 was applicable to the case. Since that case, there seems to have been no litigation on the subject, apart from the decision by the French Cour de Cassation which we have already mentioned.

A more positive aspect of the effect of Article 177 in this area



is the use made of it by the Sozialgericht Augsburg in its decision of 30.7.68<sup>(188)</sup> to submit to the Court the question whether Italian artisans came under Regulation No. 3. The German court had recourse to Article 177, not because it had any doubt that Regulation No. 3 was applicable, but because the court above it, the Landessozialgericht Bayern, had already ruled that Regulation No. 3 did not apply<sup>(189)</sup>. A similar use had been made of Article 177 in the Welchner case, where the fourth chamber of the Bundessozialgericht asked a preliminary question because a difference of opinion had arisen between it and the twelfth chamber of the same court<sup>(190)</sup>.

(c) Article 12

Case 92/63 (Nonnenmacher) was, like the Article 27,28 cases, a case in which the Court surprised most commentators. It decided in that case that Article 12 did not exclude the application of legislation other than that of the place of work, provided that it did not compel a worker to finance a system from which he would derive no "complément de protection sociale". The decision in Van der Vecht (19/67) substantially confirmed this<sup>(191)</sup>.

Before the Nonnenmacher judgment (9.6.64), it was assumed that Article 12 provided that the law of the place of work should apply exclusively. At least three Dutch courts, including the Centrale Raad van Beroep, seem to have interpreted the article to that effect<sup>(192)</sup> before the peculiar facts of the Nonnenmacher case prompted the Centrale Raad<sup>(193)</sup> to ask the Court if the rule under Article 12 was exclusive even where no effective rights existed under the law of the place of work. A few days before the Court gave its judgment, a similar case

arose before the Raad van Beroep of Groningen<sup>(194)</sup>. The Groningen court decided, as the Court was to do, that Article 12 did not lay down an exclusive rule. This appears to be the only case, apart from the Nonnenmacher and Van der Vecht cases, in which a national court gave this interpretation. The decision of the Court in Nonnenmacher seems to have been ignored by the national courts - in practice the Dutch courts, for it is almost exclusively a Dutch problem - in other cases. In the only other case in which the problem was raised directly, the Centrale Raad van Beroep asked the same question as it had in Nonnenmacher<sup>(195)</sup>. In the period between the two cases, the problem is avoided whenever it appears, although it seems to have been generally assumed that Article 12 could operate to exclude the provision of benefits under Dutch legislation<sup>(196)</sup>, although this assumption was incompatible with the Court's decisions in both Nonnenmacher and Van der Vecht. Apparently the problem has not arisen since the Van der Vecht case, so it is difficult to say what effect that decision has had.

(iii) Regulation No. 3 before the Courts of last instance

Regulation No. 3 has been considered more than fifty times by courts of last instance, by seven different courts of last instance in all the member states except Italy<sup>(197)</sup>. Fifteen of the twenty-eight preliminary references under Article 177 have been made by these courts: four by the Belgian Conseil d'Etat, two by the French Cour de Cassation, two by the German Bundessozialgericht, one by the Cour superieure de Justice de Luxembourg, sitting as a cour de cassation<sup>(198)</sup> and six by the Dutch Centrale Raad van Beroep.

Nevertheless, there are quite a large number of cases in which one can argue with confidence that the courts infringed their obligation



under Article 177(3) to refer all "questions" of interpretation to the Court. There are at least seven decisions which can now be seen to be plainly wrong. Six of these were decisions of the Centrale Raad<sup>(199)</sup> (of which four on Article 28), one of the Bundessozialgericht<sup>(200)</sup>. Of the other decisions, at least four<sup>(201)</sup> (two by the Hoge Raad, one by the Bundessozialgericht and one by the French Cour de Cassation) are open to considerable doubt, and should certainly have been referred to the Court of Justice.

(iv) Conclusion: Functioning of Article 177 with regard to Regulation No. 3.

In this area, perhaps more than in any other, Article 177 has found wide and early acceptance by the courts of all the countries concerned as a means of solving difficulties of interpretation. Despite this, we have seen that courts of last instance have not always respected their obligations under Article 177 (3), and that there have been quite a lot of "wrong" decisions (i.e. if one accepts the judgments of the Court as being "right"). It is to be feared, particularly in the case of the Dutch courts<sup>(202)</sup>, that some reluctance to make use of Article 177 may have resulted from the surprising interpretations given by the Court in certain cases. Yet it is precisely because the Court's teleological approach has led it to give some unexpected decisions that Article 177 becomes extremely important and strict observance of Article 177 (3) essential if the rule of a unified Community law is to prevail.

One of the problems<sup>(203)</sup> of Article 177 which has caused much discussion is the question of the authority of decisions given by the

Court of Justice in Article 177 proceedings. One approach is to say that the interpretations given by the Court are legally binding on national courts, not because the Court is above the national courts in any sort of hierarchy but because the Treaty gives the Court the task of interpreting Community law and consequently any interpretation given by the Court is the authentic interpretation and has the same authority as the text interpreted. But the traditional, apparently more widely-held view is that this smacks too much of the Anglo-Saxon doctrine of precedent and is alien to the traditions of continental Europe, according to which a judicial decision cannot make law. According to this view, the Court's decision is legally binding only in the case in which it is given and is merely of persuasive, moral authority in other cases. The Court of Justice itself has not dealt with the problem; in case 28-30/62 (Da Costa en Schaake), it held that it was not bound by its own decisions, but the implications of this decision for national courts are open to conflicting interpretations. The national courts themselves are divided on the issue.

With this in mind, it is very interesting to see the attitudes of the national courts in our area, and particularly their reactions to the controversial interpretation of Articles 27, 28. We may note two things: firstly, no court has expressly questioned the authority of the interpretations of the Court of Justice, or expressly refused to follow them. Secondly, three of the courts, at least, have made it plain that they regard themselves as legally bound by the decisions of the Court of Justice. We have already seen<sup>(204)</sup> that the Raad van Beroep te Zwolle was prepared to follow the Court's interpretation of Articles 27 and 28 of Regulation No. 3, even though it went against what appeared to be the meaning of the text and the plain intention of the



authors. In a more recent case<sup>(205)</sup>, the Cour d'Appel de Paris was even more explicit in its rejection of the argument that the Court's controversial judgments of 5.7.67 (Ciechelski and De Moor) were not binding beyond the cases in which they were given. To that argument the Court said:

"Considérant que les arrêts de la Cour de Justice des Communautés Européennes statuant en interprétation sont d'ordre général, car destinés à l'unification des jurisprudences des tribunaux des divers Etats membres et de ce fait s'imposent à ces juridictions".

An earlier decision of the Cour d'Appel de Colmar dealing with Article 52 of Regulation No. 3<sup>(206)</sup> is even more forthright and is worth recording as a model of how the system should work:

"Attendu ... que la mission de la Cour des Communautés Européennes étant en particulier de dire le droit au cas où se pose une question d'interprétation des dispositions du traité ou des actes des institutions communautaires, les décisions par elle rendues dans le cadre des articles 177 et 219 du Traité s'intègrent au droit communautaire et participent de ce fait de la primauté du Traité sur les législations internes; que, dès lors, elles s'imposent aux juridictions nationales au même titre que le droit communautaire; que le respect de l'interprétation donnée par la cour de Justice se trouve directement et intimement lié à celui du Traité lui-même ..."

This positive attitude to Article 177 is certainly welcome, for if the complex system of preliminary references established by that

article is to succeed in ensuring the unity of interpretation of the Treaty and acts passed thereunder, then it is important not only that Courts should make wide use of the Article to send problems to the Court, but that the answers given by the Court should have the widest authority possible.

Has the system in fact been effective in ensuring a unified interpretation of Community law, or would another system, a system of appeals for example, have been more effective? It is very difficult to give a firm answer to this. Where there is a clear decision, as in the cases of Ciecchelski and De Moor, it has generally been followed by all the national courts. These two judgments effectively settled the dispute as to the relationship between aggregation and proratisation, but the solution was a long time coming: more than eight years after the entry into force of Regulation No. 3 and more than five years after the first litigation on Articles 27, 28. It is impossible to calculate how many pensioners must have lost rights through an incorrect application of these articles.

Where the decision is not so clearcut, it seems to be far less effective. The Van der Veen and Nonnenmacher decisions, for example, seem to have made little impact on the national jurisprudence. It seems essential for the success of Article 177 that the European Court should try to help not only the referring court by considering the facts of the case (as it does), but also the national courts in general by making its decisions as clear and easily applicable as possible. The fact that this is not an appeal system, but something slower and more cumbersome would surely justify a less pragmatic approach to the questions asked.



C. Conclusion: Interpretation of the social security regulations  
by the courts of the European Communities

The study of the interpretation of Regulation No. 3 is interesting not only because of the way in which the principles of international social security laws are developed, but also because it marks a step forward in international social security adjudication, and because it illustrates both the methods of interpretation used by the Court of Justice and the functioning of the judicial system of the E.C.

The Court of Justice is the first permanent international or "supranational" court with competence to hear disputes involving the social security rights of migrant workers. Quite apart from the creation of Regulation No. 3, the competence granted to the Court has effectively extended the rights of migrant workers and their possibility of redress against social security institutions. The results of the cases have been overwhelmingly favourable to migrant workers as opposed to the social security institutions. Moreover, as well as ensuring a certain unity of interpretation and developing, albeit controversially, several principles of international social security law, the Court has given this branch of the law a certain prominence, almost a "legal respectability". Too often, although perhaps more often in Britain than on the mainland, social security law is overlooked as an object of study for lawyers; in view of its obvious importance, this seems regrettable.

It emerges clearly from our study that the Court's interpretation of Regulation 3 can be understood only in the light of the Court's view of the aims of the Regulation. This is the much-discussed "teleological" approach to interpretation<sup>(207)</sup>. Although the basis for interpretation remains the text of the provision in question, the

Court tries to interpret the text in the light of its aim or "spirit", seen within the context of the Treaty as a whole. As the Court put it in the important Van Gend en Loos decision (Case 26/62), one must, in interpreting a provision, look at "L'esprit, l'économie et les termes" - apparently in that order. As the term "spirit" suggests, it is not the aim of the authors of the Treaty which concerns the Court, but the aims of the Treaty and regulations as they stand, i.e. as seen by the Court. As is clear from Duffy (Case 34/69) and the Article 28 cases, these aims are not always to be found in other provisions of Community law - and if they were, there would still be the question of selection - but quite simply in the collective head of the Court, in the Court's conception of what the Treaty is all about. It appears fruitless, then, to analyse, as many do<sup>(208)</sup>, the interpretation techniques of the Court in terms of reasoning a contrario, contra proferentem, ab absurdo, etc., or even of recourse to general principles of law. These are little more than tricks of the trade which the Court may select at will to reach the conclusion it wants to reach, or to support that conclusion<sup>(209)</sup>. What is important is merely to analyse and criticise the Court's conception of the aims of the Communities and how far it should go in imposing its views on, or even against, the text of the Treaties or Community regulations. The extent to which the Court has in fact imposed its views has raised for some commentators<sup>(210)</sup> spectres of the parlements of the Ancien Regime. But, although it is true that the Court has carved out an unusually important and independent role for itself, the general opinion is that its influence on European integration has been a positive one<sup>(211)</sup>. This favourable opinion is supported, though not unequivocally, by the Court's jurisprudence on problems of social security law.



Finally, our study illustrates the workings of the judicial system of the Communities, and especially of Article 177 which links the two tiers of that system. The functioning of Article 177 may be considered from two points of view: from that of Community law and from that of the individual litigant. From the point of view of ensuring the uniformity of interpretation of Community law, we have seen that it is moderately effective. The defects are due in part to an occasional reluctance on the part of national jurisdictions to send problems to the Court. But, quite apart from this, the national judge will often not be in a position to see the problems raised by Community law, partly because he will not be aware of the problems raised in other countries of the Community, partly because he will have no reason for adopting the dynamic, teleological approach adopted by the Court, and which has so influenced its judgments.

From the point of view of the individual litigant, the most obvious drawback of the system is the length of time it takes. Though the Court of Justice seems efficient and usually answers questions within six months of their being asked, it is generally at least another six months before the national court considers the reply. This up-and-down procedure means that at least an extra year is added before the settlement of a dispute which has often been going on for five or six years already. In cases involving old age pensions (as many do), this result is rather grotesque and shocking. While most of the delay is due to the inefficiencies of the national systems, any measure which could be introduced to speed procedure at a Community level would surely be an improvement.

The other main drawback of the system for the individual litigant is that Article 177 gives him no right of redress against a wrong decision by a national court which does not make a preliminary

reference. While we should not underestimate the political and psychological reasons which made the authors of the Treaty decide to introduce the Court of Justice gently into the judicial life of the member states, and which may still hold good vis-a-vis the newer member states, might it not be desirable to envisage introducing a simple appeal system to replace Article 177? This would be quicker, would extend the rights of the litigant, and would probably be more effective in ensuring a uniform interpretation of Community law<sup>(212)</sup>.

A word finally on the role of the Commission and the Advocate General in proceedings under Article 177. One of the Advocates General, we know, must present reasoned conclusions in each case that comes before the Court. Similarly, the Commission has the right to present observations on each case under Article 177, and invariably exercises that right. In theory, no doubt, their functions are different: the Commission's is to protect the interests of the Communities, while the Advocate General's task is to assist the Court in ensuring "le respect du droit" in the interpretation and application of the Treaties<sup>(213)</sup>. In practice, what happens is that the Commission first presents its arguments on the case and on the way it thinks the questions should be answered. In his conclusions, the Advocate General also presents his arguments on the case and the answers he proposes. In almost every case, he has reached the same conclusion by way of the same arguments; this is not surprising since both in fact represent the viewpoint of the Communities, although with a slightly different emphasis. If the Advocate General is to help the Court in maintaining "le respect du droit", he might be more usefully employed not in reproducing the same process of reasoning as the Commission, but in going beyond the instant case, raising problems of a more general nature and probing the implications of the Court's view of the aims of the



provisions concerned.

#### 4. Revision of the Social Security Regulations: Regulation No. 1408/71

The last two sections of this chapter have been devoted to a study of Regulation No. 3, first of its origin, structure and principles and then of its judicial interpretation. Regulation No. 3 has now been replaced by Regulation No. 1408/71, but this does not mean that the legal study of Regulation No. 3 is by any means redundant. The new Regulation is merely a revised form of the old one: its structure is the same; its principles are the same; its concrete provisions, where they differ from those of Regulation No. 3, represent a reaction to the lacunae of the old Regulation - or to the Court's interpretation of that Regulation. Like Regulation No. 3, Regulation No. 1408/71 has its legal foundation in Article 51 of the Treaty and it is certain that the same principles will be applied in the interpretation of Regulation No. 1408/71: this is already clear from some of the Court's recent judgments<sup>(214)</sup>. In short, an understanding of the principles and problems of Regulation No. 3 remains essential for a proper understanding of Regulation No. 1408/71.

The task of revising Regulation No. 3 was undertaken at an early date. A number of lacunae which appeared were patched up by minor revisions of the principal regulation. Other regulations were introduced to extend the system to seasonal workers, frontier workers and seamen<sup>(215)</sup>. The system was undoubtedly made more complicated by the work of the courts, and particularly of the Court of Justice, which had thrown light on new problems and, in some cases, created them<sup>(216)</sup>. The result was an extremely complex and not very watertight system over-ripe for revision.

As early as 1964 work was begun by the Commission on a new regulation which would expand and simplify the existing ones. This led to the submission to the Council of a proposal for a new regulation, early in 1966<sup>(217)</sup>. The Council submitted this proposal to the Economic and Social Committee and to the Parliament for their opinions. The former gave its opinion in January 1967<sup>(218)</sup>; the Parliament, after receiving the excellent and thorough report<sup>(219)</sup> of its Committee on Social Affairs and Public Health presented by M. Troclet, gave its opinion which appeared early in 1968<sup>(220)</sup>. In the light of these opinions, the Commission modified its proposal, and also made a proposal concerning the annexes to the proposed regulations<sup>(221)</sup>. The Parliament and the ESC gave their opinions on the latter proposal late in 1968<sup>(222)</sup>. After long negotiations, the new regulation, Regulation No. 1408/71 finally emerged from the Council on 14.6.71 and was published in the Journal Official of 5.7.71. The implementing regulation, Regulation No. 574/72, which was to replace Regulation No. 4, was passed by the Council on 21.3.72<sup>(223)</sup>. The new system finally came into force on October 1st, 1972.

What is interesting about the whole revision procedure is not only the length of time which it took<sup>(224)</sup>, but also the role played by the Court<sup>(225)</sup>. The Court, of course, took no direct part in the elaboration of the new Regulation, but it did have a definite influence on the procedure. This was so, firstly because the litigation before the Court constantly threw up new problems; secondly, because it was to be assumed that the Court's interpretation of the provisions of Regulation No. 3 would presumably be applied to the corresponding provisions of the new Regulation unless there was some clear intention to depart from the earlier provisions; thirdly, because the Court's



interpretation of the aims of Article 51 of the Treaty would constitute "le fondement, le cadre et les limites" of the new regulation as it had for the old.

For these reasons, the Commission was bound to examine closely the decisions of the Court in the elaboration of its original proposal, and was forced to amend that proposal in the light of some of the later rulings by the Court. Because the Court has no power to give an advisory opinion on such matters, the Commission found it advisable in its observations in individual cases, to put forward interpretations which it proposed to incorporate in the new regulation, and thus to encourage the Court to say in its judgments whether these interpretations proposed were compatible with the aims of Article 51 EEC. When the Court gave its series of decisions in 1967 on Articles 27, 28 of Regulation No. 3 just before the Parliament issued its opinion on the Commission's proposal, the Parliament drew the Commission's attention to those decisions and asked the Commission to reconsider its proposal on the aggregation and proratisation of pensions in the light of those decisions. Not surprisingly, it is this part of the new regulation which bears most clearly the stamp of the Court's work.

To see more concretely the relationship between Regulation No. 3 and Regulation No. 1408/71 and the influence of the Court's decisions, it is necessary to look more closely at the provisions of the new regulation, to see how it takes a step farther in the international co-ordination of social security legislations. One of the most important aspects of Regulation No. 1408/71 is that it unified the existing set of regulations and simplified administrative procedure. But it also introduced a number of significant improvements in substance. For clarity,

we shall examine these improvements under the headings used in the analysis of Regulation No. 3<sup>(226)</sup>.

A. Scope of Application of the Regulation

Ratione personae: The title of the new regulation no longer refers to "migrant workers" as did the old one, but to the "employed persons and their families moving within the Community". This is not a change in substance, but simply a recognition of the broad interpretation given to Regulation No. 3 by the Court in cases 75/63, 31/64, 44/65, etc.

The term "travailleur salarié ou assimilé" is dropped by Regulation No. 1408/71 in favour of simply "travailleur" (worker). The Regulation opens with a definition of this term which is rather complex but seems to correspond roughly to the old term. The principle, as explained by the preamble of the Regulation is that those covered are "all nationals of member states insured under social security schemes for employed persons". What is important to note is that it was not found possible to include self-employed workers within the scope of the Regulation, because of the widely varying position of these workers under national social security regimes. Both the ESC and the Parliament recognised the impossibility of extending the regulations in this way, but both urged that work should be begun on the admittedly difficult task of elaborating a separate regulation to cover the self-employed<sup>(227)</sup>.

Ratione materiae: Here again there is little change from the provisions of Regulation No. 3, except that Article 1 (j) of the new Regulation makes it clear that so-called "complementary" schemes are not covered by the Regulation:



"This term excludes provisions of existing or future industrial agreements, whether or not they have been the subject of a decision by the authorities rendering them compulsory or extending their scope".

Although it is provided that any member state may declare this limitation not applicable to certain provisions of such arrangements, the limitation is nevertheless a very important one. Troclet, in his report to the Parliament<sup>(228)</sup>, points out the enormous importance which these complementary schemes have in modern social security systems and argues convincingly that when a social security scheme has acquired the force of law, it should be subject to the Regulation, whether or not its origin was in a collective agreement. It is regrettable that the Council did not see fit to accept the Parliament's opinion on this point, for this exclusion of complementary schemes is surely the most serious lacuna in the whole system<sup>(229)</sup>.

Maternity allowances given for demographic reasons are still excluded from the application of the Regulation<sup>(230)</sup>.

**B. Equality of treatment:** The principle of equality of treatment contained in Article 8, Regulation No. 3 is extended by Article 3 of the new Regulation to cover the right to elect two members of social security organisms, but not the right to be elected to such organisms. There is also a new provision extending the benefit of those other international social security agreements which remain valid to the nationals of all member states.

It is interesting to note that the first paragraph of Article 3 makes it clear that equality of treatment extends, as under Regulation No. 3, only to nationals resident in one of the member states, and not

to those resident in a third country. The original proposal of the Commission was unclear on this point, which led Troclet (and the Parliament) to suggest a precision which would make it quite clear that the principle of equality of treatment extended even to cover the provision of benefits to Community nationals in a third country. This proposal was rejected by the Council.

C. Conservation of Acquired Rights: The removal of residence restrictions on the service of benefits was the area in which most progress remained to be made, and in which most progress has been made.

The Court, we saw, raised the prohibition of residence restrictions into a general rule in its judgment in Case 61/65 (Vaassen-Gobbels)<sup>(231)</sup>. This interpretation was taken over by the Commission which formulated the prohibition contained in its proposal in general terms. This was welcomed by Troclet in his report, but again this too was rejected by the Council. Article 10 of Regulation 1408 reverts to a slightly expanded version of Article 10, Regulation No. 3.<sup>(232)</sup> The result is far from clear, but presumably the rule in Vaassen-Gobbels still holds to the effect that residence restrictions are still prohibited unless expressly allowed by the provisions of the new Regulation.

The most interesting area of development is that of family benefits. Under the old system family benefits were paid by the country of employment in respect of children resident in other member states, but only up to a maximum of the amount payable in the country of residence. One of the most important points<sup>(233)</sup> of the Commission's proposal in 1966 was that such benefits should be paid by the country of residence according to the law of that country. Troclet, welcoming



this proposal, pointed out that it would correspond to the growing trend in national legislation to separate family benefits from wages and that it would also simplify administration.

This was evidently a point which caused great difficulty to the Council and the solution reached was a compromise. It was decided<sup>(234)</sup> that family benefits should be paid by the country of employment as though the members of the family were resident in that country; but in the case of workers employed in France (where family benefits are higher than in the other countries, for demographic reasons), benefits are to be paid by the country of residence. It is also provided, however, that the Council should re-examine the problem before 1973 "in order to reach a uniform solution for Member States"<sup>(235)</sup>. Even the compromise solution finally reached is, of course, an improvement on the old system.

Other improvements in the provisions governing family benefits are the extension of the system to cover members of the family other than children; the specific provisions relating to the families of the unemployed; the improvement in the provision of supplements to orphans and children in the care of pensioners.

Progress has also been made in the field of unemployment benefits, although again the Commission's original proposal has been somewhat modified. The principal improvements are the removal of the reservations of France and Luxembourg restricting the application of these provisions in those countries to qualified coal and steel workers, and the removal of the requirement of double authorisation in the case of transfer of residence. The right to receive unemployment benefits after transferring residence to another country, however, is now limited to a maximum period of three months, whereas benefits under

Regulation No. 3 might be paid for a period of up to four months after the transfer of residence.

The other area in which most progress has been made is that of sickness benefits. The provisions in this area are considerably expanded and clarified. There are also a number of improvements in substance, notably the suppression of certain pre-conditions to the granting of medical care outside the competent State, the reduction of the number of cases in which authorisations may be refused (where such are required), and the special regulation of the position of the unemployed and of pensioners.

D. Conservation of Rights in the process of being acquired: The way in which Regulation No. 1408/71 tries to deal with the complex problems raised by the Court with respect to the aggregation and proratisation of old-age pensions is one of the most interesting aspects of the new Regulation.

The provisions on this topic (Articles 44-51) are not much clearer than Articles 27, 28 of Regulation No. 3. Article 45 (1) provides, more or less as Article 27 of Regulation No. 3 before it, that the institution of one State should take periods of insurance in another State into consideration where this is necessary for "the acquisition, retention or recovery of the right to benefits". Article 45 (3) extends this to the Hagenbeek type of situation and adopts the solution given by the Court in that case.

It is Article 46 which primarily governs the calculation of pensions, replacing the old Article 28. The new system appears to be roughly the following:



- (1) The institutions in those states in which aggregation is necessary to open a right to a pension go through the traditional process of aggregation and proratisation, that is:
  - (i) the institution calculates the sum to which the claimant would have been entitled if all the periods of insurance had been accomplished under its own legislation;
  - (ii) it then divides this theoretical sum in proportion to the period of insurance actually accomplished under that legislation (Article 46(2));
- (2) The institutions in those countries in which no aggregation is necessary to open a right to a pension:
  - (i) calculate the pension to which the insured person is entitled under the legislation of that particular country;
  - (ii) calculate the pension which would result from the process of aggregation and proratisation, as above;
  - (iii) retain only the higher of the two sums thus obtained.
- (3) The insured person then has a right to the total (Article 46 (1)) of the pensions calculated in the various countries in this manner, but only within the limit of the highest of the theoretical sums referred to above (i.e. calculated after aggregation, but before proratisation) (Article 46 (3)).

The impact of the Court on the system is obvious. The new provisions are much more favourable to migrants than the old ones. But do they, in fact, satisfy the requirements laid down by the Court? The Court insisted that any reduction in the rights of migrant workers would be incompatible with the aims of Article 51 EEC. But the limitation imposed by Article 46 (3) of the new Regulation could certainly, though admittedly only in rare circumstances, have the effect of reducing the rights of the migrant. If we think back to our hypothetical widow whose husband worked for forty years in Germany and for one year in the Netherlands before dying, then we can see that, under Article 46 of Regulation No. 1408/71, she would presumably be entitled to a maximum equivalent to a German pension based on forty-one years insurance, and that this would be less than the sum of the two pensions she would otherwise receive. Well may one argue<sup>(236)</sup> that this loss of rights is a "lucrum cessans" rather than a "damnum emergens", but the fact remains that there is a reduction in rights which is plainly contrary to the Court's jurisprudence on the matter. Is the limitation contained in Article 46 (3) invalid, then, as being contrary to Article 51 of the Treaty? Certainly it is, if the Court is to maintain its present interpretation of that article. It will be interesting to see what happens when, as it surely must, the matter is raised before the Court<sup>(237)</sup>.

E. Choice of Law: The provisions concerning the determination of the law applicable are slightly expanded, but make few important changes in substance.



The main point of interest is that the controversial decisions in the cases of Nonnenmacher (92/63) and Van der Vecht (19/67)<sup>(238)</sup> are reversed. Article 13 (1) of the new Regulation provides that a worker to whom the Regulation applies shall be subject to the legislation of a single member state only. Tantaroudas convincingly argues<sup>(239)</sup> that this provision could (as in the facts of the Nonnenmacher case) operate to the detriment of the claimant and that, consequently, this provision should, if the Court's interpretation of Article 51 EEC is to be maintained, be considered invalid.

F. Relation with bilateral treaties: Apart from the omission of any equivalent to Article 52 (2) of Regulation No. 3, which the Court had annihilated anyway, there is not very much change in this area. In its proposal for the new Regulation, the Commission had sought to reduce the role of bilateral treaties between member states to one of regulating the administration of Community law<sup>(240)</sup> but the Council rejected this suggestion, preferring to return to the formula contained in Regulation No. 3, according to which member states may conclude agreements "fondees sur les principes et l'esprit" of the Regulation<sup>(241)</sup>.

G. Administrative arrangements: The institution of a new Advisory Committee is the one significant suggestion of the ESC and the Parliament which has been carried into effect. The original proposal of the Commission provided that the Administrative Commission should contain some representatives of the workers. This was seized upon by both the ESC and the Parliament, who called, not for representation on the Administrative Commission, but for the creation of a

new committee which would represent the interests of the "partenaires sociaux" and assist the Commission administrative in some way.

The new Regulation keeps the Commission administrative in its old form and with much the same functions. But it also establishes (Articles 82-3) a new "Advisory Committee on Social Security for Migrant Workers", which is composed of thirty-six members, six from each country - two representatives of the Government (of whom one must be a member of the Administrative Commission), two representatives of the trade unions and two of the employers' organisations. The task of the new committee is twofold: to examine the general problems raised by the application of the social security regulations, and to formulate opinions for the Commission administrative as well as proposals for the revision of these regulations<sup>(242)</sup>.

#### H. Conclusion

Regulation No. 1408/71, it is clear, is not only an important development of Community law, it represents also another step forward in the constant improvement of the social security protection of migrant workers. Nevertheless, it is likely to have a troubled life. Firstly, it is bound to encounter problems before the Court: the provisions on the aggregation and proratisation of pensions, in particular, are manifestly incompatible with the Court's interpretation of Article 51 of the Treaty. Secondly, the system is likely to become more difficult to operate as the social security systems covered by the Regulation develop. The existing Regulation, it was seen, was devised primarily for systems based on insurance principles: with the



accession of Britain and Denmark, with the gradual generalisation of the other systems and the increasing emphasis being placed on providing a minimum coverage for all the population, it may become necessary, for reasons of administration as well as for reasons of clarity and comprehensiveness, to re-think some of the basic principles of the Regulation. The sort of problem which may arise increasingly is indicated by the Frilli case<sup>(243)</sup>. Thirdly, these problems may be compounded by the fact that general economic developments may make any advance in this field, and hence any re-negotiation of the Regulation, increasingly difficult. This last problem will be explored in the two chapters that follow.

## CHAPTER 6



## Chapter 6

### Co-ordination: its Social Function

"La sécurité sociale des migrants se trouve ... à un noeud de conflits d'intérêts: intérêts des Etats d'abord, variant selon qu'ils sont surtout "exportateurs" ou "importateurs" de main-d'oeuvre, mais aussi intérêts des partenaires sociaux et notamment ceux des travailleurs qui ne coïncident pas toujours avec l'intérêt du pays dont ils sont originaires ni avec ceux de leurs employeurs successifs".<sup>(1)</sup>

It is evident that an understanding of the "conflict of interests" of which Ribas and Voirin speak is central to an understanding of the development of the social security protection of migrant workers. Yet most discussion of the problems of co-ordinating social security schemes under Article 51 of the EEC Treaty has restricted itself to the technical and legal difficulties. Relatively little attention has been devoted either to examining the "conflict of interests" which surrounds social security co-ordination or to analysing the social function of Article 51 and its implementing regulations. It is usually taken as given that the regulations contribute to the realisation of the free movement of workers, one the "four freedoms" established by the Treaty<sup>(2)</sup>, and that therefore they are desirable both from a social and from an economic point of view.

The notion of the "free movement of workers" is, however, far from being unproblematic. Grammatically, the phrase is ambiguous, especially when it is placed beside the other three "freedoms":

the free movement of capital, of goods and of services: it is not clear whether this is a subjective or an objective genitive, whether the workers are the subject or the object of the movement. Paradoxically, it is frequently regretted, recently even by Dr. Hillery, the Commissioner for Social Affairs<sup>(3)</sup>, that the "free" movement is all too often a forced movement. And what, then, is the role of Article 51 - to facilitate the forced movement of labour? A facile question perhaps, but it does indicate the need to look more closely at the problem.

The aim of this chapter is to look at the function of the social security regulations, to disentangle and separate from one another the various strands in the "noeud de conflits d'intérêts", to tease apart, albeit in somewhat crude simplicity, the structural components of this knot of conflicting interests. The approach adopted is somewhat different from that adopted in Chapter 3. Whereas, in discussing the broader implications of harmonisation under Articles 117 and 118, it is possible to follow the heated discussion outwards to broader issues, it is more convenient in the case of co-ordination under Article 51, where the discussion does not have the same momentum, to approach the question from the opposite direction, to start with the broader issues which might throw some light on the function of Article 51. Accordingly, this chapter will start with the phenomenon of migration (as it must, if Ribas and Voirin's suggestion that this is the key to the conflict is to be pursued), examining briefly the development of labour migrations, the role of the state in relation to such migrations and the nature of social security treaties designed to cover migrant workers, before turning to the Community system and the



origins of Article 51 and Regulation No. 3. Having thus situated the Community provisions, the question will be posed whether the function of these provisions has changed since their creation. In the next chapter, an attempt will be made to see if the (changing) function of these provisions is reflected in their legal interpretation and application.

Much of the first part of the chapter may appear to be an excursus, a deviation from the subject, in so far as it does not deal directly with the social security regulations. It is the argument of the chapter, however, that, in order to understand the social function of Regulation No. 1408/71, or (and this amounts to the same thing) in order to understand the structure of the conflict of interests which determines the development of Regulation No. 1408/71, it is necessary to relate the general course of social development to the particular development of the social security regulations through a number of mediating steps.

It is argued that it is necessary not only to relate the social security regulations to the general EEC provisions on free movement, but that to understand the dynamic of their development, it is necessary to go beyond the scope of the Treaty of Rome and relate the freedom of movement established by that Treaty to the more general context of migration and its causes. Just as, in the last chapter, it was argued that a knowledge of the general problems of the international co-ordination of social security is important for an understanding of the legal problems raised by Regulation No. 3 and Regulation No. 1408/71, so in this chapter it is argued that it is necessary to look at the general features of migration before examining our immediate subject, their particular manifestation in the EEC<sup>(4)</sup>.

## 1. European migration of labour

### (1) Before 1945

Migrations in Europe are not new; there have always been important movements of peoples, for one reason or another. But the development of large scale migration in the modern sense, i.e. the migration of individuals to seek or take up employment, is closely linked with the rise of industrial capitalism in the nineteenth century. As industrial enterprises grew, they exhausted local labour supplies (mainly composed of evicted peasants and destitute artisans) and workers were induced to come from further afield, from less developed areas either in the same or in another country: "The social history of industrialisation is that of mass movements from country to town; international migration is a special case within this general pattern"<sup>(5)</sup>.

Although we tend to think of international migration in the nineteenth century as migration from Europe to America, migration from the less developed to the more advanced countries of Europe was in fact taking place simultaneously. "Of the 15 million Italians who left their country between 1876 and 1920, nearly half - 6.8 million - went to other European countries"<sup>(6)</sup>.

It was Britain which first experienced large-scale migration: Irish immigration began early in the nineteenth century and increased considerably after the famines of 1822 and 1846-47. By 1851 there were already 727,326 Irish immigrants in Britain and they made up 2.9% of the population of England and Wales and 7.2% of the population of Scotland<sup>(7)</sup>.

In France there was an excess of immigration over emigration from 1850 onwards. Here, the immigrants were not at first recruited directly into industry, they were brought in to take the place of French agri-



cultural labourers who had moved to the new industrial areas. At this stage they came mainly to frontier regions, Belgians to Northern France and Northern Italians to Alpes Maritimes on the Bouches-de-Rhone. But before the end of the century, the immigrants were being employed in industry and had been attracted away to the industrial centres of Paris, Lyon and the East<sup>(8)</sup>. The number of foreigners in France trebled in this half-century: from about 300,000 in 1851, the number rose to 1,037,778 in 1901<sup>(9)</sup>.

The development in Germany was similar though somewhat later: industrialisation in the west attracted landless labourers from the east of the country. The first immigrants, Poles (of Russian or Austro-Hungarian nationality) first took the places of these labourers, then they too moved to the developing industry of the Ruhr. Large numbers of Italians were also attracted by industry and the building trade, particularly in the southern part of the country. "In 1907 there was a total of 800,000 foreign workers in Germany and they made up 4.1% of the total labour force. The 1910 Census showed a total of 1,259,880 foreign residents, including dependants"<sup>(10)</sup>.

Already before the First World War, we thus see the development of large scale migrations resulting from the rapid development of industrial capitalism in some countries coinciding with lack of such development in others. Under these circumstances, millions of workers left their country in search of a job or a higher wage. Employers were glad to have the cheap supply of labour, especially as the immigrants were prepared to accept work rejected as being too repugnant by indigenous workers<sup>(11)</sup>. Everywhere, large-scale immigration brought social unrest: competition for jobs and housing led in all countries to discrimination against foreigners and to riots opposing foreign and indigenous workers<sup>(12)</sup>.

If this scenario appears to us remarkably modern, it is no doubt partly due to the fact that the scale of migration was considerably smaller between 1914 and 1945. The outbreak of war in 1914 brought the pre-war migrations to an abrupt halt. After the war, migration of labour was considerably less important than it had been before 1914. This may be attributed primarily to economic circumstances, the glut on the labour market in the immediate post-war years as servicemen returned home, and later the depressed state of the economy in most countries, especially after 1929. There are two principal exceptions to this trend: France experienced a shortage of manpower in the 1920s, as a result of war losses and the low birthrate. Workers were recruited under agreements concluded with Poland, Czechoslovakia, Italy and other countries. When the depression came, the foreigners were discriminated against and almost a million of them were sent back to their country of origin by the trainload<sup>(13)</sup>.

The other exception to the decline in the use of foreign labour in the inter-war period is Germany after 1933. The growth of industrial production and (after 1939) of military service led to severe labour shortages. Here, the exploitation of migrant workers took its most extreme form: by 1944, 7.5 million workers, recruited either through agreements with "friendly and neutral countries" or by force, were employed in Germany, often in unspeakable conditions<sup>(14)</sup>.

## (2) Since 1945

The international migration of labour has grown to an unprecedented scale in the period since the war. There are now more than ten million migrants (migrant workers and their families) living in the Common Market alone<sup>(15)</sup>. Foreign workers form a substantial proportion



(between 5% and almost 30%) of the labour force of most West European states. The migration of labour is at once both one of the major factors contributing to the rapid economic growth of Europe since the war and one of the most important sources of social tension and grievance.

There has been continuous immigration into France since 1945. Table I shows how this immigration developed. Three features are particularly noteworthy: the gradual, though fluctuating growth in the number of immigrants; the surge of immigration in the years 1956 and 1957; and the massive preponderance of Italians among the immigrants until the late 1950s, after which their leading position was taken over first by Spaniards and later by Portuguese. These figures do not include Algerians or citizens of former French colonies south of the Sahara; the first of these groups, the Algerians, is particularly important - by the end of 1969 there were 608,000 of them in France. In that year the total immigrant population in France was 3,177,000, or 6.4% of the total population of the country<sup>(16)</sup>. The national composition of the immigrant population is shown by Table 2.

The development of migration into the other major labour - importing country of the Community, the Federal Republic of Germany, has been rather different. The enormous influx of expellees and refugees of German nationality, combined with the difficulties experienced by German industry in the immediate post-war period, meant that employers did not meet with serious shortages of labour until about 1956; these shortages became acute in the 1960s, particularly after the frontier with the GDR had been closed in 1961. Large-scale migration into Germany thus began later than in France and its growth has been remarkably rapid. Table 3 shows the rise in the

number of migrants employed in Germany since 1954, while Table 4 shows the number of newly entering foreign workers for each year since 1958. Again, it will be noted that, until the early 1960s, Italy was by far the most important source of foreign labour and that its relative importance declined only gradually during the 1960s. By the end of 1973 there were about 2½ million foreign workers employed in the Federal Republic and they accounted for more than 11% of the labour force employed. The foreign population (including workers' families) was estimated to be almost 4 million, or about 6½% of the country's population<sup>(17)</sup>.

There is no need for our purposes to examine in detail the pattern of migration in other European countries. Table 2 shows the scale and national composition of the immigrant population in France, Germany, Switzerland and Britain. Table 5 shows the importance of immigrants in relation to the labour force (and the populations) of the member states of the EEC. It is clear from the dimensions that the migration of labour has assumed that it has important economic and social effects not only for the major receiving states (F.R. Germany, France, Switzerland, Luxembourg, etc.) but also for the major labour exporting states (Italy, Spain, Portugal, Turkey, Yugoslavia, Greece, Ireland, etc.). It is clear too that, in dealing with the rights of migrants, we are not dealing with a purely marginal phenomenon, but with the rights of a very considerable number of people.

## 2. The interests involved

How are we to understand this unprecedented growth in the number of migrants? Within the scope of a chapter devoted to the social function of Article 51 EEC, it is not possible to examine fully all



aspects of European migration. All that can be done is to trace rather crudely what appear to be the essential features of recent European migrations, to try and understand the conflict of interests involved and to draw attention to the central paradox of the phenomenon: on the one hand, it is seen as an economic "good", on the other, it is the source of the most flagrant social "ills" in Europe today.

The basic structural pre-condition for large-scale migration can be seen as the uneven development of capitalism. This uneven development may be due not only to the fact that industry develops more rapidly in one area than another, but to the interrelation between the economies of the two areas, i.e. the development in one area may well hinder the development in the other. This is likely to lead to a situation in which there is a surplus of capital (i.e. capital seeking a means of profitable investment) in one area and a surplus of labour (a mass of unemployed or under-employed workers) in another.

This is what happened in Western Europe after the War. The rapid economic growth which took place in northern Europe (most importantly, for our purposes, in France and later in FR Germany<sup>(18)</sup>) soon led to shortages of labour (and hence to a surplus of capital)<sup>(19)</sup>; the supply of labour had in any case been considerably depleted by the destruction of two world wars and the relatively low birth rate<sup>(20)</sup>. In other countries (particularly in Ireland and the Mediterranean countries), the economy grew more slowly, too slowly to provide work for all those seeking it, particularly in view of the generally higher rate of natural increase<sup>(21)</sup>. The result in these countries is, of course, chronic large-scale unemployment and under-employment.

Given this situation of uneven development, given a surplus of

capital in some countries and a surplus of labour in others, what could be more rational than to bring these two factors of production together? It is clear that in this situation "mobility will result in a better allocation and utilisation of resources"<sup>(22)</sup>. A marriage of the surplus capital and the surplus labour appears to be in everyone's interest.

Such a "marriage" can take place either in the advanced or in the less advanced country. In the former case it involves the migration of labour, in the latter it involves the movement of capital. In fact both movements usually take place simultaneously, but for the moment we are concerned only with the migration of labour, with the employment of workers from the less developed countries in the more advanced countries.

Marriage, in today's permissive society, usually takes place because both partners want it to take place, because both partners perceive it to be in their interests. So too with the "marriage" of surplus labour and surplus capital: the question why this marriage has taken place to the extent of the employment of ten million migrants can be most simply answered by saying that this is what the partners wanted - the owners of capital considered it to be in their interest to employ ten million migrants and ten million workers considered it to be in their interest to migrate for the purpose of employment. If one were to extend the metaphor, one might compare the states of emigration and of immigration to the two sets of parents: the fact that they have, on the whole considered it in their interest to encourage the match has had an important influence on the scale on which it has occurred. Perhaps, then, one way of coming to grips with the phenomenon of integration is to look at the interests of the parties concerned.



The fundamental interest of the owners of capital is to increase that capital, to make profits. There are a number of ways in which the employment of migrant workers assists the employer in the pursuit of this interest.

The most immediate and obvious advantage of employing migrants is simply that they provide extra labour power, an additional source of profit, and they make possible the full use and expansion of existing capacity. The effect, however, is not merely cumulative: the employment of migrants does not merely enable the owners of capital to increase the mass of their profits, it also allows them to obtain a higher rate of profit than they would otherwise have obtained. By swelling the supply of labour, by increasing the elasticity of the labour market, migrant workers inevitably weaken the position of labour and the bargaining strength of the labour organisations, inevitably keep wages lower than they would otherwise have been. As Kindleberger puts it:

"The slogan 'equal pay for foreigners' is a fallacy, of course, if it is thought that this means that immigrants do not reduce wages. Increased supplies of labor reduce wages, relatively, if not absolutely, even if foreigners are paid the same wages as natives"<sup>(23)</sup>.

According to his model, it is principally by increasing the supply of labour and thus holding back wage increases and increasing profits that the migration of workers contributes to the economic growth of the receiving state:

"In the country of immigration, short-term elasticity of the labor supply has a favorable impact on wages (holding them down), on profits (holding them up), on investment and growth, and on price stability"<sup>(24)</sup>

But it would be wrong to see migrants as simply providing an additional supply of labour: from the point of view of maintaining or increasing profits, migrants offer certain advantages not offered by an extra supply of indigenous labour. Migrants will generally accept lower wages than indigenous workers, since the standard of living to which they are accustomed and hence their wage expectations are lower<sup>(25)</sup>. The fact that foreigners may not formally be discriminated against on the basis of their nationality makes little difference to this, since the jobs performed by migrants are to a large extent different from those performed by indigenous workers, i.e. there is a dual labour market<sup>(26)</sup>. The common assertion that there are some jobs so repugnant or so boring that only foreign workers can be persuaded to take them, is another way of saying the same thing: in order to persuade indigenous workers to accept them, it would be necessary to pay a higher wage<sup>(27)</sup>. Migrants are also prepared to work more night shifts, more overtime, in worse conditions and at a faster rhythm than indigenous workers<sup>(28)</sup>: thus, for example, an investigation in Germany<sup>(29)</sup> has shown that employers who wish to increase the rhythm of conveyor belt production in their factory often begin by improving it on those parts of the production line where foreign workers predominate. What makes this possible is in part the traditions of the migrants, in part the generally low degree of trade union organisation among migrants, in part the desire of many of them to make as



much money as possible as quickly as possible before returning home, but also the fact that the political and industrial rights of migrant workers are far more restricted than those of indigenous workers<sup>(30)</sup>. Quite apart from practical difficulties of communication, their right to trade union representation is often restricted by law<sup>(31)</sup>, they have no right to vote in the country in which they work<sup>(32)</sup>, their right to change employment is limited and their continued residence in the receiving state often depends on their employer's continuing willingness to employ them. The ability of migrants to bring industrial or political pressure to bear in order to achieve higher wages or better working conditions is thus very limited<sup>(33)</sup>.

Other, more global advantages result for the employers in the receiving state from the "foreignness" of the foreign workers. The receiving state obtains the advantages of an abundant supply of labour, without having to bear many of the connected disadvantages. As a general rule, migrants are in the receiving state only while they are productive: the costs of the unproductive periods of the migrant's life (childhood, unemployment, invalidity, old age) are generally borne by the state of origin. The supply of migrant labour also has the advantage for the receiving state of being capable of being turned on or off as required, i.e. migrant workers can be allowed into the country or refused admission or sent home in accordance with the demands of the economic cycle. This function of migrant labour is sometimes referred to as the "Konjunkturpufferfunktion"<sup>(34)</sup>. As the French sociologist, R. Aron, has put it:

"The supply of foreign labour not only mitigates the inadequacy of demand for certain types of job, but also forms a sort of industrial reserve force. The industrialised countries open

and close the inlet valve and sometimes also the outlet valve at will. The employment of foreign workers on a short-term basis serves to prevent unemployment among the indigenous working population in the event of a slowing down of the economy or of a recession. It is the foreign worker who from time to time comes up against closed doors or even loses his job"<sup>(35)</sup>.

In a time of recession, the social tension and financial costs resulting from unemployment can be reduced by restricting the entry of new migrants or by sending home those already in the country. The effect, of course, is to export these costs and tensions to the countries of origin<sup>(36)</sup>. This appears to have happened, for example, in the German recession of 1966-67. The number of foreigners employed in FR Germany fell during this recession from 1,314,000 in June 1966 to 903,500 in January 1968<sup>(37)</sup>. In 1967 the number of foreigners employed fell by 18.5% as compared with 1966, while the total number of persons employed dropped by only 3.2%<sup>(38)</sup>. Nor can this fall in the employment of foreigners be entirely attributed to a reduction in the number of new entrants: official estimates put the number of migrants returning home between autumn 1966 and autumn 1967 at 500,000, as compared with figures of 300,000 and 200,000 for comparable periods before and after 1966-67<sup>(39)</sup>.

A further advantage of migrant workers, from the point of view of profits, is that they occasion, at least in the short term, little indirect expenditure via taxation. At least in the initial period of migration (when migrants are generally young and unaccompanied by their families) little needs to be (i.e. little is in fact) spent on providing



additional housing, education, hospital services, etc. for them<sup>(40)</sup>. As the migration "matures"<sup>(41)</sup>, as the average age of the migrants rises and their families follow them, pressure for better social provision tends to increase. The build-up of this pressure may, however, be delayed by a policy of "rotation", by encouraging the fairly rapid replacement of one "generation" of migrant workers by another<sup>(42)</sup>.

Finally, there are what may be called the "political advantages"<sup>(43)</sup> of importing foreign labour. Recourse to foreign workers means that a considerable section of the working population is deprived of political, trade union and civil rights. More important, perhaps, is the effect on the cohesion of working class solidarity as a whole. Owing to difficulties of communication (for cultural as well as linguistic reasons), owing to competition with indigenous labour for unskilled jobs and to the fact that the influx of migrants allows many indigenous workers to rise to "superior" positions, large scale immigration has been accompanied everywhere by a lack of solidarity and even hostility between indigenous and foreign workers<sup>(44)</sup>.

Those, in crude outline, are the principal reasons why it is profitable for the owners of capital to employ workers from the less advanced countries. The reasons why many employers have found it more advantageous to employ these workers in the more advanced countries rather than in their countries of origin are numerous: among them may be mentioned the problem of the proximity of the market, the inadequacy of the infrastructure in the less developed countries, tax and tariff barriers, political security, etc. It should be noted that neither the economic advantages of employing migrants in the northern countries nor the relative disadvantages of investing directly in the less developed

country are necessarily unchanging: a change in the character of the migrants going north or an increase in the social tensions engendered by migration may make the encouragement of labour mobility less attractive; conversely, an improvement in the communication network or political stability of the less developed countries may make investment there more interesting. To this problem we must return later. For the moment it must suffice to point out that migration grew rapidly in scale during the 1950s and 1960s and was seen as being unequivocally advantageous by most employers.

To say that migration was advantageous to employers is surely to say also that it was good for profits, for investment, for growth, in short, for the "economy" of the receiving states. Most economic analyses, however, they see the long-term implications of migration, recognise that it has played an essential part in the economic growth of Western Europe since the War<sup>(45)</sup>. Thus Kindleberger writes<sup>(46)</sup>: "the major factor shaping the remarkable economic growth which most of Europe has experienced since 1950 has been the availability of a large supply of labor". Thus Kahn stated in a recent interview<sup>(47)</sup>: "France has only been able to develop its economy with the speed it has because she's been able to make use of 3,000,000 foreigners". This was also the view of the Spaak report<sup>(48)</sup>: "Il est ... indispensable de ... noter le facteur très important d'expansion qu'un afflux de main-d'oeuvre peut constituer pour un pays".

It would be one-sided to assert that migration was in the sole interests of the capitalists of the north. The fact that so many workers from the south have chosen to migrate suggests that, given the existing situation, they too have found migration to be in their interests. The main reasons for migrating - the "push" factors as



Castles and Kosack call them<sup>(49)</sup> - are usually economic<sup>(50)</sup>. The migrant has usually experienced or faced the prospect of unemployment or dire poverty at home. In some cases, the aim is simply to earn higher wages, often with some definite purpose in mind, such as the purchase of land or of a small business<sup>(51)</sup>.

The ruling classes in the countries of origin have also seen it as being in their interests to encourage, or at least to allow the emigration of labour. For them too there are both political and economic advantages<sup>(52)</sup>. Politically, emigration provides an important safety valve through which much of the discontent arising from large scale unemployment can be released. Economically, the remittances sent home by workers abroad provide a short-term advantage by contributing to the improvement of the balance of payments<sup>(53)</sup>. In any case, as Portuguese experience indicates, it would be very difficult to limit the emigration of workers unless frontiers were closed altogether, and to do this while high unemployment continued would almost certainly lead to an explosive situation.

Here we have seen one side of migration, the "good" side of the paradox mentioned earlier. Migration is good for the economy of the receiving state, it is in the interests (at least the immediate interests) not only of the northern employers and the receiving states but also of the migrants and of the ruling classes in the country of origin. Hence it appears desirable to encourage migration, since this leads to the most "rational" allocation of resources.

What of the other side of migration, of the "bad" side of the paradox, of the fact that migration is widely acknowledged to be the source of one of Europe's most pressing social problems? If we are to understand the increasingly vocal criticism of the policy of migration,

it is necessary to look briefly at the "bad" side of the paradox, at the social evils and their relation to the economic good. It may be suggested that the basic flaw in the argument so far has been to equate the interests of the employers and the interests of the migrants in migration, to equate the "choice" of the employer to employ migrant labour and the "choice" of the migrant to emigrate in search of a job, to equate the "pull" and the "push" factors of migration, when the only "choice" for the migrant is often one between utter destitution and life (often for longer than anticipated) in the worst conditions of industrial Europe, when the "push" factors of poverty and unemployment are always present somewhere while the "pull" factors" depend on the decision of a relatively small number of people as to how best they can make profits. This is why some critics have seen migration not as the rational and harmonious expression of the common interests of employer and migrant, but have described the relationship between employer and migrant as one of "super-exploitation"<sup>(54)</sup> and that between receiving state and state of origin as one of "neo-colonialism"<sup>(55)</sup>. These expressions, though we do not necessarily wish to adopt them, have the merit of drawing attention to the negative aspects of these relationships.

The term "super-exploitation" refers to a feature of migration already mentioned, namely that migrants are a source of super-profits or additional profits for the employer. The term draws attention to the social consequences which this economic "super-exploitation" entails for the migrants. Part of the advantage of employing migrants derives, as we saw, from the fact that it is possible to pay them lower wages than indigenous workers would expect, that they have few trade union and political rights, that they are prepared to accept



worse working conditions, that they occasion little social expenditure. It is hardly surprising, then, that some of the very aspects which make migration an economic "good" mean also that the situation of migrants is one of the most serious social problems faced by Western Europe today<sup>(56)</sup>.

The miserable conditions in which migrants live and work are well known. It is becoming common to refer to them as a sub-proletariat<sup>(57)</sup> and to draw comparisons between their life and the conditions suffered by industrial workers in the early capitalism of the nineteenth century<sup>(58)</sup>. Like those early workers they enjoy, in practice and usually in law, no political rights and only rudimentary trade union rights. At work, they generally occupy the lowest paid<sup>(59)</sup>, the most unpleasant<sup>(60)</sup> and the most dangerous<sup>(61)</sup> jobs<sup>(62)</sup>. Outside work, they often live in horrifying conditions. The factory barracks of Germany, the wretched bidonvilles of Paris do not need to be described here<sup>(63)</sup>.

The other term sometimes used to describe the negative aspects of migration, "neo-colonialism" or "neo-imperialism" refers not so much to the consequences for the individual migrants as to the disadvantages for the country of origin. In this view, the essence of migration is that it involves a transfer of human resources, a transfer of value (the value of the labour power of the migrants) from the country of origin to the receiving state. After the country of origin has paid for the education of the worker up to the age of his greatest productivity, the benefit of that productivity goes largely to the receiving state: some economists have estimated that the movement of each worker involves a transfer of value equivalent to about \$5000<sup>(64)</sup>. Moreover, the resources so lost to the country of

origin are far from being always unskilled. On the contrary, it is usually skilled workers who are the first to migrate from a country, and some receiving states make great efforts to attract skilled manpower while others (Britain, for example) forbid the immigration of unskilled workers<sup>(65)</sup>. This has led to shortages of skilled labour in several countries of emigration in recent years<sup>(66)</sup>. Indeed, if the regions or countries of origin do manage to industrialise, local employers sometimes find that, because of emigration, there is a shortage of labour or that they cannot afford to pay wages to compete with the employers of the north<sup>(67)</sup>.

It is doubtful whether the short-term or supposed economic advantages for the country of origin really outweigh the loss of human resources. Although the remittances sent back by workers abroad improve the balance of payments<sup>(68)</sup> and raise the standards of consumption in the areas from which the migrants come, there is little evidence that they contribute to the economic growth of the area. The remittances are only rarely invested productively, and, as the increased consumption which they stimulate is not matched by a corresponding increase in production, their effect tends to be inflationary<sup>(69)</sup>. Nor does the acquisition of skills by the migrant normally contribute much, as is sometimes claimed, to the economy of his country of origin. Few migrants actually acquire more than the basic skills, specific to a specific job on a specific machine, while they are abroad. Of those who do acquire skills, it seems that few put them to any use on returning home. An OECD study, based on reports from Italy, Spain, Turkey, Greece and Portugal, came to the conclusion that:

"Far from thronging into jobs which are appropriate to the



skills, or at least the specialised training or work-discipline, they have acquired i.e. industrial jobs, they (returning migrants) find themselves places in the traditional economy at the level of the craft trades or the services, and in any case prefer to set up for themselves" (70).

Castles and Kosack concluded from their survey that although "it would be possible to construct a model in which migration did have a beneficial effect ... the reality looks different ... Our conclusion must be that at the present time migration does little to assist in the development of the home countries of the migrants" (71).

If these views are correct, the two sides of the paradox of migration are not merely related, they are inseparable: the economic growth of the northern countries is not merely accompanied by social misery for the migrants and economic disadvantages for the countries of origin, the growth is actually built on this social misery and this transfer of value from the home countries. One may ask why, when the bad aspects of migration have always been there, they have only recently attracted so much attention: is it because of the increase in the scale of migration, because of the increased vociferousness of migrants, or is it perhaps due to a conjunction of these factors with a change in the economic interests of the major owners of capital?

But we are not concerned with this problem here: the aim at this stage is merely to "set the scene" for Article 51. Having sketched some of the essential features of European migration, we must now turn briefly to the role played by the state in relation to migration.

### 3. The role of the State

Since the early part of this century, receiving states have played an active part in relation to migration. Before that, in the second half of the nineteenth century, states had done little either to restrict or to promote migration. The ideal of "free movement" did in fact apply to a large extent. Workers moving from one country to another did not require residence permits, work permits or even passports; nor would they be recruited by official agencies.

As the scale of migration increased, these liberal policies were called into question. On the one hand, workers, fearing greater unemployment and a fall in wages as a result of the swelling of the "industrial reserve army" by immigration, demanded that protectionist measures be taken to safeguard their position on the labour market. The employers' interests, on the other hand, required an abundant but not necessarily an unrestricted supply of labour. The state could thus apparently meet the demands of both sides by introducing protectionist measures and controlling immigration, while at the same time taking steps to ensure an uninterrupted supply of migrant labour to the employers of the receiving states. This, broadly speaking, is what in fact happened. The introduction of protectionist measures in most countries at the beginning of this century was accompanied by the conclusion of international agreements providing for the recruitment of workers and removing obstacles to the free movement of the nationals of the contracting parties. Thus, in France, where the debate on the merits of protectionist and liberal migration policies was still in progress, the Franco-Italian labour treaty of 1904, the first of its kind, was acclaimed as showing the way forward



to a system in which international treaties would provide the solution to the liberalism-protectionism dilemma<sup>(72)</sup>.

Since the introduction of protectionist legislation, receiving states have played an active part in relation to migration in three main ways: by controlling or restricting entry into a country; by restricting the rights of migrants after entry and by organising and subsidising the recruitment of migrant workers.

With certain limited exceptions, all governments now restrict entry into their country, particularly for the purpose of employment. Since the introduction of passports, residence permits and work permits, it has come to be taken for granted that states should regulate the entry of foreigners into their country and particularly the employment of foreigners. The degree of control exercised and the policies behind the exercise of this control vary in time and from country to country, in response to economic and social tensions.

In recent years, policies have become more rather than less restrictive. Castles and Kosack's study of immigration policies in the major labour-importing countries of Europe leads them to the conclusion:

"The general pattern is one of governments allowing in workers according to the needs of the labour market ...

With the exception of the European Economic Community, the general tendency has been towards greater organisation and control of migration, rather than towards free movement"<sup>(73)</sup>.

The fact that states control the influx of migrant workers does not mean that their aim is simply to reduce their number. On the contrary, they often take an active part in the recruitment of foreign workers. The organised recruitment of foreign workers started soon

after the turn of the century: in 1908, the Agricultural Employers' Federation of North-Eastern France concluded an agreement with the Emigration Committee of the Diet of Galicia, which led to the migration of some twenty thousand Polish agricultural workers to France before the First World War<sup>(74)</sup>. Between the wars, the French government concluded recruitment agreements with Poland, Czechoslovakia, Italy and other countries<sup>(75)</sup>, but the actual recruitment was carried out by private agencies. It was not until 1945 that the Office National d'Immigration (O.N.I.) was set up and given a monopoly of recruitment. Recruitment agreements were concluded with all the main labour-supplying countries and recruiting agencies were actually set up in several of them. "French employers who want to employ foreign workers are supposed to apply to O.N.I., which finds suitable workers and arranges their journey to France, after medical examination. The employer pays a fixed fee for these services"<sup>(76)</sup>.

The system in Germany is rather similar. The Federal Government has concluded recruitment agreements with all the principal suppliers of labour: with Italy in 1955, with Spain and Greece in 1960, Turkey in 1961, Portugal in 1964 and Yugoslavia in 1968. Under these agreements, the Bundesanstalt für Arbeit sets up agencies in the countries concerned. After specific requests from German employers have been received by the agencies, the labour authorities of the recruitment countries try to find suitable candidates. The local German agency ensures that the worker is suitable for the job, medically fit and without a criminal record. Finally, after the contract is signed, the agency arranges the worker's journey to Germany<sup>(77)</sup>. The German employer pays a fee for each worker which, until quite recently was



considerably lower than the actual costs incurred by the Bundesanstalt für Arbeit. Until the end of 1971, the employer had to pay 60DM for each Italian worker and 165 DM for workers from other countries, whereas the average cost to the Bundesanstalt für Arbeit for each worker was 235DM<sup>(78)</sup>. The state thus not only organised but also subsidised the recruitment of migrant workers<sup>(79)</sup>.

Once the migrants arrive at their destination, the state imposes certain restrictions on them which, as already mentioned, greatly weaken their position in relation to their employers. The most important of these is the system of work permits, without which a foreigner may not enter into employment. The work permit effectively deprives the foreign worker of the right, so well established in liberal theory, to sell his labour power to the highest bidder. In Britain, a work permit is issued to a foreigner only if no British worker is available for the job, and it restricts the worker to that particular job: permission must be obtained for any change in employment<sup>(80)</sup>. In France too, the work permit required by all foreigners is usually issued for a specific job, for a limited period and for a restricted area; if the foreigner wishes to change job, he must obtain a new permit and this may be difficult<sup>(81)</sup>. In Germany, the position of migrants is even less secure. They are usually employed initially for one year only, and the work permit usually restricts their right to work to that period and to a particular employer<sup>(82)</sup>.

In all these countries, the system of work permits is reinforced by a system of residence permits. In order to stay in the country the foreigner must have a residence permit, and the residence permit is made dependent on the work permit. This is particularly strictly enforced in Germany: any breach of the contract (such as changing jobs before contract has run its course) will result in expulsion of the migrant

from the country. A central index is kept of foreigners who have broken their contracts or who, for other reasons, are not to be allowed to work in Germany again<sup>(83)</sup>. These measures which bind a worker to a particular employer and "punish" him for breach of contract (for it is hard to describe it otherwise) are reminiscent of the legal provisions which governed employment at the beginning of the last century.

Other restrictions relating to trade union and political activity have also been mentioned already. In Germany, foreigners did not, until recently, have the right to sit on works councils in factories<sup>(84)</sup>, and their right to engage in political activity is limited by the Ausländergesetz of 1965<sup>(85)</sup>. In France, foreigners are not allowed to be trade union officials<sup>(86)</sup>. In addition to these legal provisions, it must be remembered that other forms of action, particularly police harassment<sup>(87)</sup> may have the effect of restricting the trade union and political activity of migrants.

It is clear that the receiving state normally contributes to the "exploitation" of the migrant in two ways: by organising and subsidising his recruitment for the employer and by restricting his rights vis-a-vis the employer. It might be said that there is a third way in which the state contributes, not so much by action as by neglect or omission. The fact that most receiving states have neglected to provide adequate facilities (particularly housing) for the migrants has added to the short-term economic benefits to be drawn from their employment: the present debate in Germany about infrastructure investments makes this clear<sup>(88)</sup>.



#### 4. International social security agreements

It is within this context that we must place international agreements aimed at co-ordinating social security schemes to cover migrant workers. We are at once faced by a paradox, for is it not paradoxical that States should, on the one hand, not only tolerate the bad housing and working conditions of the migrants but even make it almost impossible for migrants to take action to achieve better conditions, while, on the other hand, they give away millions of pounds in the form of social security benefits as a result of these social security agreements? How, in other words, are these social security agreements to be related to the general process of migration?

It is clear that there is some relation. Most social security agreements follow or accompany large scale migrations from one of the contracting states to the other. Delannoe confirms this<sup>(89)</sup>

"D'une manière générale, une convention de sécurité sociale est précédée par le phénomène du déplacement de travailleurs quittant le pays d'émigration, où les possibilités d'emploi sont limitées, pour se rendre dans le pays d'immigration où il y a pénurie de main-d'oeuvre. Ce déplacement est généralement précédé d'un Accord entre les deux pays portant sur l'effectif des travailleurs migrants, sur les conditions de recrutement et d'emploi, etc."

Then he continues, explaining the motivation of social security agreements:

"S'il va de soi qu'à ce stade de l'opération (i.e. at the stage of the recruitment agreement) les motifs économiques sont prépondérants, lors de la conclusion d'une convention de sécurité sociale, par contre, les considérations sociales prévalent"<sup>(90)</sup>.

What does this mean? Why should the receiving State suddenly exchange its economic for its social hat? Whatever its motivation, the conclusion of a social security agreement often involves the transfer of millions of pounds from the social insurance institutions of the receiving state to the nationals of the country of origin, i.e. to the migrants and their families. The annual net expenditure of German social security institutions resulting from the application of social security agreements (including Regulation No. 1408/71) must be in the region of at least 1000 million DM<sup>(91)</sup>. This may not be a very big sum in relation to total expenditure on social security benefits, but it is not so small a sum as to be given away without some reason.

It is not surprising that social security treaties are either sought by the governments of the labour-exporting states or offered to them as a concession. The advantages for these states are obvious. Firstly, considerable sums of money are transferred to it from the receiving state. This not only helps to improve the country's balance of payments, it also relieves it of part of the burden of supporting children, the unemployed, old and disabled. The governments may also be under popular pressure from migrants' organisations and trade unions to do something to improve the lot of workers forced to go abroad to find work. But only by assuming that the first consideration (the transfer of money from the receiving state to the state of origin) is the more important can we understand why social security agreements have increased and multiplied, whereas the governments of the country of origin rarely, if ever, intervene to ask for action to be taken to improve the housing<sup>(92)</sup> and other social conditions of the migrants.

The advantages for the receiving state are less obvious. One reason often invoked is the assumption that the non-co-ordination of social



security schemes would discourage labour mobility, or alternatively, that where there is competition for migrant labour between several receiving states, the workers will be attracted to the state which provides the best protection for the children he has left at home, for himself in his old age, etc. The conclusion of social security agreements is thus a means of encouraging labour mobility, of attracting migrant workers to one's own country; this element of competition is likely to have a cumulative effect, one bilateral agreement leading to another<sup>(93)</sup>.

An additional reason for the receiving state to conclude an agreement is no doubt the sentiment of social justice or, more concretely, the wish to maintain social stability. In this sense the provision of social security for migrant workers is akin to its provision for indigenous workers: extending protection to migrants means extending the socially stabilising effect of such protection. The resentment likely to be caused by the non-co-ordination of social security systems and the argument that migrants should be properly protected is reinforced by the fact that, whether or not such an agreement exists, whether or not they are likely to receive any benefits, migrant workers are obliged to pay social security contributions on the same terms as indigenous workers<sup>(94)</sup>.

Thirdly, the receiving state may agree to sign a social security agreement as part of a wider package which would bring other advantages to it. The current Association negotiations between the EEC and the Maghreb states provide an example of this: the EEC states have offered to conclude an agreement on social security as part of the Association "package"<sup>(95)</sup>. Hanotiau suggests that states may even discriminate

against foreigners in their social security schemes in order to use this discrimination as a bargaining counter in international negotiations:

"Sur le terrain diplomatique ..., et dans un souci de protection des nationaux à l'étranger, les discriminations constituent souvent un facteur de négociation, une monnaie d'échange dans les discussions internationales"<sup>(96)</sup>.

One can see these various factors at work in the negotiation of the first (and apparently the best documented<sup>(97)</sup>) social security agreement, the Franco-Italian treaty of April 15th, 1904. As with later treaties, the agreement was reciprocal in form: French workers in Italy would benefit as much as Italians in France. In fact, however, there were about 200,000 Italians working in France and only 10,000 Frenchmen working in Italy. The benefits for Italy were obvious: the treaty facilitated the transfer of savings and of such social security benefits as existed from one country to the other, and removed vis-a-vis Italians nationality discriminations contained in the French laws on industrial injury and old age pensions. In return, the Italians originally offered the French certain commercial advantages, but this idea was eventually dropped. The main advantage for the French government was that, in the second part of the treaty, the Italian government undertook to improve its social legislation. For some time, French employers had been complaining that, because of the backwardness of Italian social legislation, the production costs of Italian employers were very low and French industry had been suffering as a result. It was hoped that the effect of the 1904 Treaty would be to raise the production costs of Italian industry.



The 1904 treaty served as a model for subsequent treaties. Italy had similar provisions inserted in commercial treaties with Switzerland, Germany and Austro-Hungary within the following year<sup>(98)</sup>. After this the agreements increased rapidly in number. By 1920, 31 agreements had been concluded, 24 of them devoted solely to social security; by 1945, their number had risen to 133; between the beginning of 1946 and the end of 1966 a further 401 had been signed<sup>(99)</sup>, in addition to a number of multilateral conventions.

It would be both impossible and fruitless to trace the motives that lay behind all these treaties. It is enough to see them as part of the general give and take of international relations. A distinction is suggested by Doublet<sup>(100)</sup> between the old pre-1945 treaties which had "un caractère utilitaire et empirique" and a new breed of post-war treaty in which: "c'est une interpénétration plus grande des nations et de leurs régimes de sécurité sociale qui a été poursuivie plus que l'adoption de mesures propres à faciliter des migrations"<sup>(101)</sup>. This is misleading in so far as it suggests that social security treaties based on socio-economic considerations are a thing of the past and that the European states of today<sup>(102)</sup> are interested only in creating a rational network of social protection. Nevertheless, there is a distinction to be made here. Delannoo formulates it more precisely by distinguishing between "les conventions qui s'inspirent de motifs socio-économiques" and "les conventions qui s'inspirent de considérations axées sur la politique internationale d'un pays"<sup>(103)</sup>. By the former he means treaties concluded between two countries where there is an important flow of migrants from one of the countries to the other. The latter phrase refers to treaties signed by two countries between which there is no significant migration, for example the

treaties between Belgium and the UK or between Belgium and Switzerland. These treaties, he suggests, should be seen simply as treaties of mutual benefit or treaties of friendship. Another way of formulating this distinction, which seems well-founded, would be to distinguish between those treaties which result in a significant and one-sided transfer of money and those which do not. Despite Doublet's chronological distinction, it seems probable that the number of people benefiting under the former type of treaty, if not the actual number of these treaties, is still far higher than the number of those receiving benefits under the latter type<sup>(104)</sup>. It is clear that only the former, the more traditional type of treaty can be placed squarely within the framework of migration and migration policies.

##### 5. The EEC System of Free Movement

So far we have approached the social security of migrant workers in general terms, in terms of the traditional relationships between states. It has been suggested that migration should be seen as a result of the uneven development of capitalism, that it brings large profits to the employers of the north, largely at the expense of the migrants and their countries of origin. The receiving states have promoted this migration and restricted the migrants' rights in a manner favourable to their employers. These states have nevertheless conceded certain social security rights to migrants through international agreements, partly as a means of attracting migrant labour, partly as a means of preserving social stability, often too as a means of gaining certain commercial advantages. It is now time to approach our subject more directly and ask whether the EEC adds anything fundamentally new to the relations so far described.



The notion of European economic integration adds nothing to modify our analysis of the main features of the relationships giving rise to and engendered by migration. The basic conclusion of the theorists of economic integration<sup>(105)</sup> is that, in a common market in which unemployment exists or will be created, factor mobility is necessary for the efficient allocation of resources, for the maximisation of production. In other words, given a situation of uneven development, given a surplus of capital in one area and a surplus of labour in another, it is "rational" to try to bring the two factors of production together, to encourage the employment of southern workers by northern capital.

As mentioned above<sup>(106)</sup>, the Spaak report adopted this approach. The bringing together of the factors of production would make an important contribution to raising standards of living:

"La création de ressources nouvelles, l'utilisation de ressources inemployées, la mise en commun des facteurs de production sont finalement la contribution essentielle qu'un marché commun doit apporter au relèvement du niveau de vie"<sup>(107)</sup>.

The encouragement of labour mobility should not be limited, as it was in the ECSC treaty, to qualified workers. On the contrary, the unskilled and unemployed labour of the south should be encouraged to take on the worst paid and most unpleasant jobs in the north, thus giving indigenous workers the opportunity to find better jobs:

"On pourrait même soutenir qu'il y a un intérêt commun à faciliter les mouvements de la main-d'oeuvre à proportion qu'elle est moins qualifiée: c'est celle-ci, en effet, qui trouve le plus difficilement à s'employer

dans les pays où le chômage est étendu; dans les pays d'immigration, elle vient relayer la main-d'oeuvre nationale, qui peut ainsi rechercher les métiers mieux rémunérés ou moins pénibles"(108).

The Treaty of Rome adopted the view that the migration of labour should be encouraged, or at least facilitated. This seemed to correspond to the interests of all the governments: the Netherlands and particularly Italy had chronic unemployment, the other countries were beginning to experience shortages of labour. Italy and the Netherlands were eager to get rid of their unemployed, the employers of the other countries were eager to employ them<sup>(109)</sup>.

It may be objected that to argue, as has been argued here, that the Common Market adds nothing fundamentally new to the relationships connected with migration is to overlook the important new element introduced by the Treaty of Rome, the free movement of workers. The Treaty does not simply encourage the movement of workers, it removes from the member states the right to control this movement and the right to discriminate against the nationals of other member states<sup>(110)</sup>.

To understand why the labour-importing states agreed to abandon these rights, it is necessary to see that, although the concept of European integration in no way transforms the basic relationship of exploitation, it did add some new elements to the normal pattern of migration negotiations.

The most important of these new elements was the increased bargaining power of the Italian government. The ILO report of 1955 on the "Social Aspects of European Co-operation" points out that ever since the War, Italy and the other states of southern Europe had been urging a liberalisation of the international labour market, had, in



all discussions on international co-operation, been putting forward their desire, "Mittel und Wege für eine Abwanderung der überschüssigen Arbeitskräfte nach den nördlichen Ländern zu finden"<sup>(111)</sup>. But this demand had constantly met with resistance from the northern countries. The Report thinks it unlikely that the southern governments will persuade the northern countries to accept the free movement of labour unless they, in return, lower tariff barriers or make similar concessions:

"Ob sich durch zwischenstaatliche Abkommen über die internationale Freizügigkeit der Arbeitskräfte viel mehr erreichen lässt, erscheint zweifelhaft, es sei denn, dass die durch engere wirtschaftliche Zusammenarbeit verfolgten Ziele etwas weiter gefasst werden als dies bisher möglich war. Man darf unseres Erachtens erwarten, dass nach der Erzielung konkreter Ergebnisse auf anderen Gebieten der wirtschaftlichen Zusammenarbeit-etwa einer erheblichen Verminderung der Handelsschranken-die einzelnen Länder sich auch allmählich bereit finden, hinsichtlich der Zulassung fremder Arbeiter eine flexiblere Haltung einzunehmen"<sup>(112)</sup>.

It seems reasonable to conclude that this is what actually happened. Thus, it is not enough simply to say, as Dahlberg does<sup>(113)</sup>, that the principle of free movement was accepted because Italy wanted to get rid of its unemployed and the northern employers wanted to employ them, for large-scale migrations have taken place without any "freedom of movement", without the receiving state abandoning its right to control entry and to discriminate against foreigners: this explains only why

migration was encouraged, not why free movement was accepted. It is necessary to add that Italy wished to ensure that the northern states would not be able to limit the migration of Italians, and that they would not be discriminated against, and that the Italian government was able to have its way in return for other concessions, i.e. as part of the general "package deal" of European integration. In this respect it is perhaps significant that restrictions on the movement of workers were to be gradually removed during the period of transition, at the same time as tariff barriers were gradually being dismantled<sup>(114)</sup>.

The Italian position was no doubt supported or justified by a number of arguments. Firstly, there is the curious notion that the free movement of workers is somehow part of the "logic of the common market". Thus Dahlberg tells us that part of the reason for the inclusion of Articles 48 and 49 in the Treaty was "the economic logic involved in establishing a common market"<sup>(115)</sup>. The only reason which Swann, in his book on the "Economics of the Common Market". gives for the inclusion of the provisions on free movement is that it is "in keeping with the concept of a common market"<sup>(116)</sup>. Beever explains this more fully:

"As far as the Community is concerned, free movement is part of the philosophy of its founders, and is written into the Rome Treaty. The basic principle of the Common Market is that the economic process must not be distorted, and if goods, capital and services are to be permitted free movement then it would represent a distortion if labour were not"<sup>(117)</sup>.

The basic notion behind these arguments seems to be that the "idea of the common market" (seated no doubt at the right hand of the Idea of the



Good in Plato's heaven) is to rationalise the economy by opening up the markets of the member states to free competition. By removing tariffs, protectionism and the wasteful inefficiency it conceals are done away with, by removing barriers to the free movement of capital and labour, the most efficient allocation of resources is ensured. Two objections may be made to this sort of argument. Firstly, it is not at all logical: in no way does it follow from the dismantling of tariffs that restrictions on the mobility of workers must be removed; nor is there any evidence that the removal of controls on migration contributes to the efficient allocation of resources - on the contrary, the granting of additional rights to Italian workers has probably deterred northern employers from employing them, from consummating the intended marriage between surplus Community capital and surplus Community labour. The second objection is that this sort of approach conceals the concrete interests involved: the removal of tariff barriers is in the interests of efficient or powerful producers eager to enlarge their market, but it is not at all clear that the removal of controls on migration is also in their interest, which perhaps explains, incidentally, why the system of free movement has not functioned very satisfactorily. The explanation of free movement in terms of the "logic of the common market" also conceals differences in national interest. It conjures up the image of a system in which the interests of the various countries are evenly balanced: this is not in fact the case, since Italians have consistently accounted for about 80% of intra-community migration<sup>(118)</sup>. To say that the argument concerning the "logic of the common market" is untenable is not of course to deny that it may have been used to some effect.

Another argument, also related to European integration, which has been used to support the free movement of workers is based on the notion of a "European citizenship"<sup>(119)</sup>. It is argued that, if the EEC is a step towards political union, then freedom of movement is to be seen as a step towards European citizenship, towards the granting of full civic rights to citizens of any member state wherever he may be within that political union. This argument, in so far as it goes beyond expressing an ideal, greatly embellishes the reality of migration: if the Italian migrant working in the Ruhr is the symbol of the future, the outlook is bleak indeed. It is doubtful whether this approach had any effect on the negotiation of Articles 48 and 49, although it may have had some influence on their subsequent application<sup>(120)</sup>.

Probably the most important argument to be used in support of the Italian demand for free movement was the realisation that the implementation of the Treaty was likely to create unemployment in certain industries and certain areas:

"Der fortschreitende Abbau der Handelshemmnisse bringt es mit sich, dass einzelne Länder oder Regionen nicht mehr im Windschatten der Konkurrenz liegen und nunmehr dem internationalen Wettbewerb nicht mehr gewachsen sind. Regionale Freisetzung von Arbeitskräften oder Lohnsenkungen zur Hebung der Konkurrenzfähigkeit wären die Folge. In diesen Fällen ist die internationale Arbeitsmobilität geeignet, die Arbeitsmärkte in den weniger begünstigten Gebieten zu entlasten"<sup>(121)</sup>.

The social tensions resulting from the redundancies caused by the operation of the Common Market could be reduced by making it easier for workers made redundant to go and work in another part of the Community.



6. The origins of Regulation No. 3

We have now set the scene for Article 51 of the Treaty. As mentioned at the start of this chapter, the immediate framework for Article 51 is provided by the notion of the free movement of labour. The EEC's system of free movement has two essential features. On the one hand, the Treaty of Rome aims to promote or at least facilitate the migration of labour, because this is economically beneficial. In this respect, migration within the EEC has the same character and the same function as migration anywhere. But the system of free movement not only aims at increasing the number of migrants, it also represents a concession won by the Italian government, the abandonment by the member states of the right to control migrations from other member states and to discriminate against migrants who are nationals of other member states.

Social security agreements of the traditional variety are, it has been suggested, to be seen as one element in the migration policies of, and relations between, labour-importing and labour-exporting states; more specifically, they can be seen as concessions which benefit not only migrants directly but also the government of their country of origin and which may be granted by the receiving states for any or all of three main reasons: to encourage migration, to ensure social stability, to obtain trade or other concessions from the state of origin.

It is the first of these reasons, the encouragement of migration which is invariably put forward as the main reason for the negotiation of the Convention which was later transformed into Regulation No. 3.

This Convention had its origins in Article 69 of the ECSC Treaty. This Article was designed to promote the migration of coal and steel workers within the Community. Its fourth paragraph provided that member

states should try to make "tous arrangements qui demeureraient nécessaires pour que les dispositions relatives à la sécurité sociale ne fassent pas obstacle aux mouvements de main-d'oeuvre". An intergovernmental conference met to discuss these "arrangements" in May 1954<sup>(122)</sup>, but the discussions which followed were "longs et laborieux"<sup>(123)</sup>. There were considerable technical difficulties involved in co-ordinating six different systems<sup>(124)</sup>, but one of the main problems appears to have been the financing of the system and the division of costs between the various member states. The scheme originally proposed seems to have been less favourable to the labour-exporting states than that which was eventually adopted<sup>(125)</sup>. Because of the difficulty of the negotiations, the Convention was not signed until December 9th, 1957. By this time the Treaty of Rome had already been signed, and partly in order to avoid the process of parliamentary ratification<sup>(126)</sup>, it was decided to convert the Convention into a regulation of the new EEC. In the form of Regulation No. 3, it became the first major piece of EEC legislation<sup>(127)</sup>.

In order to understand the ratio or function of the Convention (and Regulation), it is necessary once again to distinguish between the labour-exporting and the labour-importing states, i.e. essentially between Italy (and to a lesser extent the Netherlands) and the other states. It is clear from the accounts published by the Commission Administrative<sup>(128)</sup> that the effect of Regulation No. 3 is to transfer considerable amounts of money from the labour importing states to Italy. Consequently, it is not surprising that Italian commentators should regard improvements in the regulations as benefits for which Italy should negotiate against the other states. Thus, Motta concludes his review of the proposals to amend Regulation No. 3 by insisting that the Italian government should take a firmer stand:



"Tale dato pone la esigenza di una più ferma posizione contestativa nel corso delle trattative ... Tale esigenza è tanto più sentita se si considera che i lavoratori interessati alla libera circolazione, per usare la terminologia comunitaria, sono per la quasi totalità lavoratori italiani"<sup>(129)</sup>.

Although six states signed the Convention and there is no large-scale migration between most of them, it is nevertheless justifiable to think of the Convention in terms of the more traditional type of social security agreement<sup>(130)</sup>, i.e. it is one of those agreements which accompanies large-scale migrations and results in considerable net transfers of money.

If the function of the Convention from the Italian point of view cannot be divorced from the benefits to Italian migrants and the sum of money transferred, it must still be asked what the primary aim of the labour-importing states was. All the evidence suggests that they saw the main aim as being the removal of an important obstacle to the movement of workers. This is suggested not only by the wording of Article 69 (4) of the ECSC Treaty but by the fact that it is the only motive put forward by most commentators (especially those writing at the time) to explain the existence of the Convention<sup>(131)</sup>. Their view is that the fear of losing entitlement to benefits or of being discriminated against by the social security scheme of the receiving state constituted a serious obstacle to mobility which it was necessary for the ECSC to remove. The link between the Convention and the mobility of labour which existed in the minds of some at least of the negotiators emerges clearly from an article<sup>(132)</sup> written in 1957 by Doublet, Director General of Social Security in France and almost

certainly involved in the negotiation of the Convention. In an aside he explains why he thinks that the original financing scheme proposed, under which the costs would have been borne in common by the member states and the High Authority, was justified:

"Il apparaissait, en effet, normal de partager cette charge entre les trois parties pour les raisons suivantes:

- le pays du lieu de travail profite de l'activité du travailleur immigré;
- le pays de résidence en bénéficie également car son économie est indirectement soulagée par le départ de travailleurs sous-employés, et directement alimentée par la consommation sur son sol d'une partie des gains réalisés par lesdits travailleurs dans le pays où ils s'emploient;
- la Communauté car elle bénéficie en définitive des avantages découlant de la liberté de circulation de la main-d'oeuvre"(133)

It does not matter that this argument is unconvincing. What is interesting is that the costs resulting from the Convention are treated as costs incidental to migration, to moving workers or encouraging them to move from one country to another. The argument is that those who benefit from the migration should share the costs involved.

To emphasise the motive of the negotiators for the labour-importing states is not, of course, to deny that the Convention has had important side-effects. Clearly, the social security position of Community migrants has been improved, and this may have contributed in some degree to social stability. But the main aim of the northern governments, the reason why they were prepared to concede so much money<sup>(134)</sup> was the purely economic one of encouraging the movement of workers. There is no evidence that the conclusion of the Convention was directly linked to any concession from the Italians in any other



field.

## 7. The Changing Function of the Social Security Regulations

We have seen the interests and the policies which brought Regulation No. 3 into existence. The question which now arises is this: if the social security regulation came into being as a result of a policy (both in Italy and in other member states) of encouraging migration, what will happen to them if this policy changes? If the costs which result for the northern governments from the operation of these regulations are regarded as part of the costs of encouraging migration, what will happen if the northern governments no longer want to encourage migration? If the socio-economic forces which brought the legal structure of Regulation No. 3 into being change radically, will this change be reflected in the application, interpretation or development of the social security regulations, or has the legal structure become independent of its socio-economic basis?

There are two questions to be considered; has the socio-economic function of the social security regulations changed? If it has, has this change been reflected in their legal development? The latter question is considered in the next chapter, here we are concerned only with the former. It is sometimes suggested<sup>(135)</sup> that, although Article 51 and Regulation No. 3 originally had an economic function, their social function is now more important. What does this mean?

Various factors suggest that the function of Article 51 has indeed changed, that its prime function is no longer to encourage Italians to go and work in the factories of the north. Among these factors are: the decline in the absolute and relative importance of intra-Community migration; the fact that there is very little ground for thinking that the system of free movement in general, and the social

security regulations in particular, have the effect of promoting migration; and the changes in the migration policies of the receiving states.

One of the most striking features of the development of migratory patterns since 1958 has been the decline in the importance of intra-Community migrations. In 1958, 65% of the work permits granted for the first time to foreign workers in the member states went to Community workers, and 35% to workers from outside the Community. By 1965 this proportion had been reversed, 65.8% of the new entrants being non-Community workers and only 34.2% being of Community nationality<sup>(136)</sup>. The trend has continued: by 1969 only about 20% of new entrants came from within the EEC. In 1970, less than 30% of the total number of foreigners in member states came from other member states of the Community. The number of Italians emigrating to other Community countries fell absolutely, from 205,530 in 1961 to 145,526 in 1969<sup>(137)</sup>.

There are various reasons for this development. The most obvious, and probably the most important, is the improvement in the Italian economy. The development of industry in northern Italy led to a fall in the number of unemployed<sup>(138)</sup> and to a slight closing of the gap between wage levels in Italy and elsewhere<sup>(139)</sup>. The incentive for workers to go abroad to find employment was consequently reduced: northern Italians could usually find work close at hand, southern Italians often needed only to migrate as far as northern Italy. Nevertheless, there were still more than 880,000 unemployed in Italy in 1970 and the rate of unemployment continues to be far higher than in any of the other original member states<sup>(140)</sup>.

Another reason which contributed to the decline of intra-Community migration may, paradoxically, have been the Community system of free movement, one of the aims of which was to promote that migration. The



system of free movement was put into effect gradually, the first regulation being Regulation No. 15/61 (of 16th August, 1961), which was replaced first by Regulation No. 38/64, which was in force from May 1964 until it was replaced in November 1968 by the definitive Regulation, Regulation No. 1612/68. Under this regulation, Community nationals have the right to seek work in any member state; work permits are abolished for Community nationals and a residence permit of five years' validity is granted automatically to any Community worker who has found employment; discrimination on the grounds of nationality is made illegal in practically all areas of work and life except the sphere of civil rights and voting<sup>(141)</sup>. Thus, not only are restrictions on the right of community nationals to enter employment removed, but their rights and security after they have entered employment are extended. Even after they have found a job, their legal position is considerably more secure than that of non-Community migrants.

One of the points which caused the greatest difficulty in the negotiation of the regulations was the question of Community priority, of establishing a system which would give Community migrants some priority over non-community migrants<sup>(142)</sup>. The Italian government insisted that this was an essential part of the system of free movement. As Falchi<sup>(143)</sup> explained subsequently<sup>(144)</sup>:

"Il faut souligner que si ce principe (Community priority) n'avait pas été établi, la libre circulation serait restée un droit théorique et n'aurait pas permis aux travailleurs intéressés à se déplacer de jouir de conditions plus favorables, étant donné que vraisemblablement les employeurs des Etats membres préféreraient embaucher des travailleurs (et tel est le cas des travailleurs des Pays tiers) qui ... disposent, en général, d'une moindre protection juridique".

He expands on this point later in the same article<sup>(145)</sup>:

"Mais il y a d'autres raisons qui, d'après les observateurs, sont assez importantes pour amener les employeurs à embaucher de la main-d'oeuvre extra-communautaire: en premier lieu la stabilité dérivant du fait que la rupture du contrat de travail comporterait le retour immédiat au pays d'origine, et, en outre, le fait que les travailleurs extra-communautaires, ne disposant que de la tutelle assurée par les Consultats et n'ayant pas des Associations et des organismes para-syndicaux, se montrent beaucoup moins revendicatifs que certains travailleurs communautaires."

There was thus a danger, in the Italian view, that the system of free movement might rebound against Community migrants; by giving them more rights, it might make it more difficult for them to find employment.

Despite strong opposition from the French and particularly the German employers and governments<sup>(146)</sup>, the principle of Community priority was gradually accepted. Under Article 30 of Regulation No. 38/64, areas of the Community with a labour surplus had fifteen days in which to indicate whether they could fill listed Community vacancies, and only if they could not do this were the member states free to recruit in third countries. Regulation No. 1612/68 reinforces this: Article 16 (2) contains a requirement not to offer jobs processed through the Community vacancy clearance system to workers from non-member countries within eighteen days of the receipt of the offer by the services of a member state with labour surpluses. But there are indications that the system has not worked well. Article 16 (3) contains important exceptions to the principle<sup>(147)</sup>, and employers seem to have



little difficulty in evading its effects<sup>(148)</sup>. The Italian government has demanded that the principle of Community priority should be reinforced and that at the same time the rights of non-Community migrants after entry into employment within the Community should be increased, in order to prevent "social dumping", i.e. in order to discourage employers from turning to these migrants as a particularly cheap form of labour<sup>(149)</sup>.

If the Italian view<sup>(150)</sup> is correct - and the fact that the numbers of non-Community workers employed in the Community has grown rapidly despite the existence of large reserves of unemployed within the Community<sup>(151)</sup> leads considerable support to this view - then there is some ground for believing that the Community system of free movement has acted as a barrier rather than as a stimulus to intra-Community migration<sup>(152)</sup>, that, by giving the Community workers extra rights, the Community has simply increased the attractiveness of non-Community workers.

Certainly there is very little evidence to suggest that the Community system of free movement has had the effect of stimulating migration within the Community. Böhnning devotes particular attention to this problem in his book "The Migration of Workers in the United Kingdom and the European Community". After examining patterns of migration to all the original member states of the Community and to the United Kingdom for the period 1958-1970, he comes to the conclusion:

"The existence of free movement effects is clearly visible on a significant scale only for Belgium and in this case it is probably due as much to a deliberate Belgian policy as to the simple removal of the work permit procedure ...

The key factor is labour demand: when demand is low, no degree of freedom of movement can help significant numbers of redundant workers to find suitable employment; when demand is high, citizens of Community countries have in post-war Europe needed no freedom of movement to find work, to be able to send for their wives and children, and to stay as long as they wished<sup>(153)</sup>.

Dahlberg's assertion that the sharp rise in the numbers and relative importance of intra-Community migration in 1965 "is in large part due to the greater Community priorities given under Regulation No. 38"<sup>(154)</sup> seems unfounded, for he takes no account of conditions affecting the supply of or demand for labour. In fact, 1965 was a year of economic recession in Italy in which unemployment rose, and in which new and stricter Swiss controls on foreign workers led many Italians there to go to Germany<sup>(155)</sup>. Böhning points out that Italian emigration to Britain also increased both absolutely and relatively in the same year<sup>(156)</sup>. If the upsurge in Italian migration in 1965 was in part due to Regulation No. 38/64, then the effect seems to have been short-lived, for numbers fell again in 1966.

If the EEC system of free movement as a whole has had no significant effect on migration patterns, it would seem to follow, a fortiori, that Article 51 and Regulation No. 3 can have had little effect on migration. It would be difficult to show that intra-community migration would not have declined more rapidly had it not been for the existence of Regulation No. 3, but there is little evidence that the co-ordination of social security has had any perceptible effect on the flow of migrant workers.



Another factor which suggests that the function of Article 51 has changed is the recent trend in migration policies. In recent years the tendency has been for the migration policies of the main labour-importing countries to become more restrictive. This may be attributed to a number of causes. The rapid growth in the number of foreign workers in these countries, combined with the inadequacy of the facilities provided for them, has led to serious tensions and even to riots between foreign and indigenous workers in some areas<sup>(157)</sup>. If this has been the case even in periods of economic boom, when the jobs of indigenous workers have not, on the whole, been directly threatened by the influx of migrants, then the danger of social instability becomes greater as the economic situation deteriorates, particularly in the wake of the recent "oil crisis".

But it is not only the slow-down in the rate of growth which makes the employment of foreign workers less important for the employers of the labour-importing countries. There are signs also that some of the conditions which made the employment of these workers particularly profitable are changing. Despite their lack of rights, there appears to be a growing industrial militancy among these workers, as evidenced for example by the strike at Ford's in Germany in 1973<sup>(158)</sup>. The increased militancy, the growth in numbers and the "maturing"<sup>(159)</sup> of the migration, i.e. the fact that the later migrants are often older and accompanied or joined by their families, makes increased expenditure on the social infrastructure, so long neglected, almost inevitable<sup>(160)</sup>. As the costs are increasing, the quality of the labour imported is deteriorating: young men are being replaced by older ones, town people by peasants, migrants from relatively advanced by those from less advanced countries<sup>(161)</sup>. And as the attractions of importing

labour diminish, the attractions of exporting capital appear to be growing: in particular, the development of the economic infrastructure in many peripheral areas is making the profitable investment of capital there and the employment of foreign workers in their country of origin more feasible<sup>(162)</sup>.

For all these reasons - the rise in social tensions, the slow-down in economic growth, the decline in the quality of the migrants, the increasing attractiveness of investing abroad - there has been a tendency for migration policies to change in recent years. Switzerland, the country with the highest proportion of foreign workers in its labour force, took measures to restrict the entry of foreigners as early as 1964, measures which were modified in 1970<sup>(163)</sup>. Britain took steps to restrict Commonwealth immigration from 1962. France tightened its control of immigration in 1968<sup>(164)</sup>; the issue of work permits was greatly restricted by the Fontanet circular of 1973<sup>(165)</sup>, and the immigration of all non-Community workers was brought to a halt in the summer of 1974. The most important labour-importing state, FR Germany, has taken similar steps in the face of the present economic difficulties, or, as David Stephen has put it, "Germany took the energy crisis as its excuse for announcing, on 23rd November 1973, a ban on the entry of new foreign workers"<sup>(166)</sup>. Of more lasting significance perhaps is the fact that a recent official report<sup>(167)</sup> has recommended that the Government should take permanent measures to restrict the influx of non Community foreign workers. The Dutch government recently (1974) introduced a Bill to restrict immigration from countries outside the EEC<sup>(168)</sup>.



Three features seem to characterise this latest trend in migration policy. Firstly, there is the attempt to reduce the number of foreign workers entering the country. Secondly, there is increased emphasis on the need to "integrate" migrants into the community of the receiving country, by providing better vocational training, language instruction, housing, etc. In Switzerland, the regulations of 1970 considerably increased the freedom of foreigners, once in the country, to move from one job to another<sup>(169)</sup>. This integration policy probably represents a response both to the discontent of migrants and also to the need of employers for a more stable and more skilled labour force. Castles and Kosack argue that the liberalisation of movement in Switzerland corresponded to the particular interests of big business: once the entry of workers is restricted, they argue, it is in the interests of big as opposed to small employers to free the movement of foreign workers within the country: being able to pay higher wages, they can then attract scarce labour away from the small entrepreneurs<sup>(170)</sup>.

That the new trend in migration policy does correspond more to the interests of big companies than to those of small entrepreneurs is suggested also by its third feature: the restriction of immigration is accompanied by attempts to encourage investment abroad. The relation between the two aspects emerges particularly clearly from the German report to which we have already referred<sup>(171)</sup>. This report, which recommends a reduction in the number of migrants employed in Germany, stresses that it is important to reduce as much as possible the damage that would result for the countries of origin. To this end, the report suggests that the Federal Government might take three types of action. Firstly, the Government should direct overseas aid to building up the infrastructure of the country of origin and so

providing a basis for the profitable investment of capital; within the EEC, this could be done through the proposed regional fund. Secondly, the government should promote private German investment abroad by liberalising its import policy, i.e. by removing tariffs and other barriers which might cut those investing abroad off from the markets at home. Thirdly, the Federal Government should "insist" that the governments of the countries of origin remove all restrictions on foreign investment, safeguard property rights and try to keep wages down<sup>(172)</sup>. The fact that the report recommends that the measures taken to encourage investment abroad should be complemented by a policy of promoting labour-saving technical innovation at home<sup>(173)</sup> reinforces the impression that the measures it proposes correspond primarily to the interests of large companies<sup>(174)</sup>.

It seems possible, then, that the new trend in migration policy is more than conjunctural<sup>(175)</sup>. A combination of factors points in this direction: the social problems resulting from migration in the northern countries are growing; the economic attractions of importing labour power into the northern countries are declining as the quality of the migrants deteriorates and social costs rise; investment in the present labour-exporting countries is becoming more feasible as their economic infrastructure develops. Earlier in this chapter<sup>(176)</sup> we pointed out that the desired "marriage" of northern capital and southern labour could be consummated either in the north (involving the migration of labour) or in the south (involving the export of capital). It was stressed that the relative attractions of the two forms of union were not necessarily unchanging. From what has been said here, it seems likely that the trend<sup>(177)</sup> is for the attractions of exporting capital to the southern countries to grow, while the



advantages of importing labour decrease. It is the policy of the Commission to encourage this trend within the EEC by means of a regional policy. This trend - if trend it be - is generally welcomed: it would free southern workers from the necessity of going abroad to find work. Against this it might be argued that to change the place in which northern capital and southern labour come together does nothing to alter the basic relationship and that the problems involved in this relationship will merely reappear in a different form<sup>(178)</sup>. But to examine these arguments would be to stray too far beyond the bounds of our subject.

However one views the significance of these changes, it is clear that the environment and the function of the social security regulations have changed. Doublet, writing in 1957, could treat the costs of implementing the proposed Convention as costs incidental to encouraging migration. It is no longer satisfactory to see them in this light: there is little evidence that these regulations do in fact encourage migration; the importance of intra-community migration has declined greatly, and northern industry does not, in any case, have any difficulty in attracting migrant labour<sup>(179)</sup>; finally, the recent trend in the policies of the northern countries is to discourage migration. Certainly one should not exaggerate the change: in particular, the problem of attracting skilled labour and the role of the social security regulations in relation to this should not be overlooked. Nevertheless, it is clear that a change has taken place, that the function of the social security regulations has to some extent become divorced from the immediate socio-economic forces which brought them into existence. If one were to attempt to explain today why governments are prepared to maintain and even extend the social security rights of foreigners, the

explanation would certainly have to lay less emphasis on the aim of attracting migrant workers and more on the aims of preserving social stability and good international relations, and perhaps also on bureaucratic inertia. It would be absurd to try and quantify the change, but it is undeniable that a change has taken place.

This is no doubt the kernel of truth in the assertion that the original "economic" function of Article 51 has now been replaced by a primarily "social" function. It is true that the co-ordination of social security should be seen less as part of the "economic" policy of attracting migrants, more as part of the "social" policy of integrating the migrants into the Community. But this formulation is misleading if it suggests that the original self-interested motives of the negotiating states have now been replaced by a disinterested and concerted effort to improve the lot of the migrant workers. Regulation No. 1408/71, which succeeded Regulation No. 3, was the subject of seven years' negotiations. The negotiations - which were described by one of the participants as "tres, tres, tres, tres, tres dures" - took so long not only because it was necessary to devise technical solutions to fill the gaps in the protection afforded by Regulation No. 3, but also because it was necessary to persuade the northern governments to increase the amount of money annually transferred to Italy and to Italian migrants. The difficulty of the negotiations suggests strongly that, although the nature of the interests involved had changed, the conflict of interests surrounding the social security of migrant workers had certainly not vanished.

This brings us back to the starting point of this chapter, to the statement of Ribas and Voirin that:

"La sécurité sociale se trouve ... à un noeud de conflits d'intérêts" (180).



We have tried to gain some insight into the forces involved in this conflict and their changing pattern. In the next chapter we must ask whether this change in the nature of forces is reflected at all in the interpretation or development of the law.

## CHAPTER 7



## Chapter 7

### Co-ordination Law and its Social Function

In the last chapter attention was focused on the social function of the social security regulations, on the socio-economic forces and policies which brought the regulations into existence. In the previous chapter, the same regulations were approached from a different angle, we examined the legal tradition of which these regulations form part, the way in which the regulations developed this tradition and the legal problems of interpretation which arose. It is the task of this chapter to try to relate these two analyses.

At the beginning of chapter 5, it was pointed out that the co-ordination regulations are very different from Articles 117, 118 EEC. Unlike the provisions discussed in the first part of this thesis, they are very much "lawyer's law", a large and complex body of norms having a high degree of internal coherence. Whereas legal discussion of Articles 117, 118 EEC almost invariably refers to extra-legal considerations, this is rarely the case with the regulations passed under Article 51 of the Treaty. These are usually treated as being quite autonomous of the social forces which surround them, as having a purely internal coherence and an internal dynamic, such that changes in their provisions can be understood in terms of legal decisions or reactions to lacunae in the law.

That this view of the autonomy of the regulations has a certain justification cannot be doubted. To try to understand a decision of the Court of Justice or most of the provisions in Regulation No. 1408 without reference to the whole legal structure which surrounds them would be absurd. As we saw in chapter 5, the development of the regulations and of the protection which they provide can be presented

quite coherently without reference to any external considerations of policy. As, in general, it would be a mistake to deny the existence and significance of a specific legal structure, of a specific legal framework of thought and development, so, in particular, it would be a mistake to underestimate the autonomy of these regulations and their insulation from the social and economic forces which surround them.

Nor can it be doubted, however, that this autonomy is merely relative. The autonomy of the legal provisions in this case is without any doubt greater than in the case of Articles 117 and 118, but it is clear that the regulations are insulated from the interplay of social and economic forces only to a certain degree. Thus, to take an extreme example, if the change in the social climate were so great as to lead to a war between Italy and the Federal Republic, the social security regulations would presumably cease to operate altogether. If, to take a less extreme example, the Council of Ministers ceased to meet, the existing regulations might well continue to operate, and to be the subject of interpretation by the Court, but there would be no legislative development of their provisions. But the question which interests us is a more realistic one: is it likely that a much less significant change in the environment of the regulations, namely a change in the migration policies of the member states, will be reflected either in the interpretation or in the legislative development of these regulations?

The point can be made clearer by referring to two other examples. Renner, in his pioneering study<sup>(1)</sup>, showed how the change in the socio-economic function of property was reflected over the years in a change in the legal rules relating to property. A study by the Commission<sup>(2)</sup> - to take a less significant example but one which is more closely



related to our subject - has recently sought to relate the nature of the immigration policies of the member states (whether primarily economic or both economic and demographic) to the legal norms governing the entry and integration of foreigners, the implication being that a change in the immigration policy of the member states would be reflected in a change in these norms.

It is a question, then, of trying to understand the degree of autonomy of the law, the extent to which the processes of interpretation and legislation are insulated from the social and economic forces which surround them, and consequently the extent to which the development of the law is a function not only of its internal dynamic but also of these external forces. The answer will clearly vary from one law to another. The different interpretations of Articles 117, 118 EEC are, it was suggested in Chapter 4, closely related to social and economic considerations and consciously directed at obtaining a desired political end. Similarly, the relation between a change in migration policy and a change, say, in the regulations governing the entry of family members is fairly clear. But the relation between a change in the policy which gave birth to a legal provision and a change in the interpretation or development of that provision is not always obvious. In particular, it is not at all obvious how, if at all, the change in policy towards migrants which we observed in the last chapter will be reflected in the interpretation and development of the regulations governing the social security of migrants.

In order to gain a more precise picture of the relation between the external factors to which we have referred and the development of the social security protection of migrants, it may be helpful to deal separately with the development of the regulations by interpretation and by legislation.

Interpretation:

In discussing the interpretation of Regulation No. 3 in chapter 5, we concentrated on the work of the Court of Justice. At least as interesting in the present context is, however, the work of the Administrative Commission established by Article 43 of Regulation No. 3, and maintained in existence by Article 80 of Regulation No. 1408/71. One of its duties (Article 81(a), Regulation No. 1408/71) is "to deal with all ... questions of interpretation arising from this Regulation and subsequent regulations". Such interpretations are not legally binding, they do not affect the right of recourse to national tribunals, nor to the Community Court of Justice. Their interest in this context lies in the fact that they constitute a sort of half-way house between legislation and interpretation. The Administrative Commission is a body which is no doubt more open than the Court to policy considerations and which is likely to give its interpretations more in response to what it feels to be the needs of the situation than according to any canons of legal reasoning.

The Administrative Commission normally meets ten times each year. Each member state is usually represented in practice by one representative (usually the director in charge of social security in the ministry of social affairs), one deputy (who is often a specialist in international social security questions) and one technical adviser. The Commission is normally represented by one representative and one deputy, and a representative of the ILO attends to give technical assistance. What is interesting about the composition of the Administrative Commission is that its members are all specialists in social security rather than experts on migration policy. The published decisions of the Administrative Commission give little indication of their motivation, but one of the participants in their meetings felt,



in an interview, that migration policy played little role in the deliberations of the Administrative Commission, and that changes in migration policy would have little effect on their decisions.

Most of the decisions taken by the Administrative Commission are at a level of detail far beyond the bounds of our survey. They are generally concerned with the smooth administration of the system rather than with the scope of the protection of migrants. A notable exception to this was the decision taken at the 37th and 38th sessions<sup>(3)</sup> of the Administrative Commission in 1962 to adopt a broad interpretation of the scope of application *ratione personae* of the regulations, i.e. that it should apply not only to migrant workers *stricto sensu* but to all employed persons travelling within the Community. It is interesting to note that the arguments within the Administrative Commission were conducted entirely in legal form, centring on the question of the compatibility with Article 51 EEC of a broad interpretation of the scope of the regulations. It is, however, very unlikely that it was the force of the legal arguments which finally overcame the initial opposition of the Luxembourg and especially of the French governments. The decision was, in fact, taken more in spite of, rather than as a result of, the legal arguments. Because of the reservations of the Commission's legal service, the decision was recorded as an "agreement" rather than as a "decision". As we know from the judgment in Case 75/63 (Unger) and subsequent cases, the Court gave the same interpretation on "legal" grounds.

The manner in which the decision of the Administrative Commission on the scope of application of the regulations was taken suggests that the interpretations of this body are indeed made in more or less direct response to policy considerations, mediated in this case by "instructions" of the French and Luxembourg governments. Neither this decision nor any

of the Administrative Commission's other decisions indicate, however, that the policies which motivate them are consciously related to the member states' migration policies. On the contrary, the evidence that is available suggests that they are not.

The other major body entrusted with the task of interpreting the regulations is the Court of Justice. The Court, as we saw in Chapter 5, has made many important decisions which have had the effect of extending the social security rights of migrants: the decision in the Unger case (75/63) that the regulations were not applicable solely to migrants *stricto sensu*, the interpretation of the regulations to bring in Italian artisans (De Cicco, 19/68), workers with a "mixed career" (Janssen, 23/71) and means-tested pensions (Frilli, 1/72), the insistence that the system of aggregation and proratisation should not operate to the detriment of the migrant (Ciechelski, 1/67), etc.

The Court's extensive interpretation of the regulations resulted, it was argued, from its stress on the aim or policy of Article 48-51 EEC: because the aim of these articles is to promote the free movement of workers within the Community, any measure which damaged the interests of the migrant would be incompatible with that aim. This is, in a sense, to interpret the provisions of the regulation in the light of a policy. This "policy", however, is not to be identified without more ado either with the policies which led the member states to include those provisions in the Treaty or with the present policies of the member states, or indeed with the policies of the Commission. The Court's interpretation of the aims of the relevant articles is not one which shows a great awareness of, or indeed concern for either the immediate interests of the states<sup>(4)</sup> or the broader economic considerations surrounding the whole question of migration. The "policy considerations" by which the Court



is moved, in other words, are unlikely to follow the contours of economic development as closely as do the policies of the member states. The initial policy decision of the Court, as to the extent of the implications of Articles 48-51 EEC, was no doubt coloured by all sorts of attitudes which can be seen in turn as a response to the social and economic environment, but, once taken, this decision becomes to a large extent enshrined, or embalmed, in the judgments of the Court and is likely to be not very, or only very slowly, responsive to the socio-economic environment. In any case, there seems to be very little sign of any change over the years in the Court's attitude towards free movement or towards migrants: if anything, the Court's attitude has recently become even more liberal. It might perhaps be satisfying to be able to point to a particular judgment of the Court as reflecting a change in attitude to migrants, to relate that change in attitude to the change in policy of the governments and to relate the change in policy (and hence the change in the Court's attitude) to the interests of big business. But in this case there is no evidence of such a high degree of social co-ordination<sup>(5)</sup>.

### Legislation

It is hardly surprising that changes in the policies which surround the regulations should find little reflection in the interpretation of the regulations. The change in the policies has, after all, been a subtle, a gradual and a recent one which has not directly impinged on the Community's system of free movement. In any case, it is not clear what the implications of the new approach, even if fully translated into law, would be for the social security regulations. Even if those who develop them through legislation or interpretation consciously sought to mould the social security regulations to meet the requirements of

the new approach to migration, what effect would this have on the contents of the regulations? In what way would a regulation co-ordinating social security schemes which was designed to "integrate" migrants into the community of the receiving state differ from one which was designed to attract migrants to that state?

The problem arises more clearly in relation to the legislative development of the protection afforded by the regulations. Any change in policy is likely to affect the process of legislation before it affects the process of judicial interpretation. But, given that no statements have been made explicitly relating the development of the social security regulations to recent trends in migration policy, what is it that one should look for as a reflection of the new policy?

There are three possibilities which might be considered. Firstly, one might expect that member states which are no longer very interested in attracting more migrant labour would be reluctant to improve the existing regulations in any way which would greatly increase their expenditure. If so, then it is likely that this reluctance would manifest itself most clearly in the course of the negotiations on the revision of Regulation No. 3. Secondly, one can ask whether there are any specific measures more appropriate to "integrating" migrants than to attracting them, and whether any preference was shown for such measures in the revision of Regulation No. 3. Thirdly, one would expect to find an increased reluctance to extend the benefit of the existing regulations to any new categories of workers or to any more social security schemes. We shall consider each of these three possibilities in turn.

The negotiations on the revision of Regulation No. 3 were, as we saw at the end of the last chapter, very long and very hard. There were



certainly technical factors which contributed to the length of the negotiations - not least of these the difficulties raised by the decisions of the Court - but the basic reason why the negotiations were so hard was apparently the fact that no state wanted to pay any more than was absolutely necessary. In particular, the German delegation was reluctant to accept any improvement in the provision of unemployment benefits, the French refused adamantly to accept the scheme proposed for the payment of family benefits and the Dutch were reluctant to pay more on pensions. Eventually, a rather delicate "compromis global" was reached, which became Regulation No. 1408/71. This compromise is rather an unstable one, for two reasons: firstly, because the compromise on the calculation of pensions, which is embodied in Articles 45 and 46 of the new Regulation, is manifestly incompatible with the case law of the Court of Justice<sup>(6)</sup>; and secondly, because no agreement was reached on the payment of family allowances. Instead, it was decided that, in the case of a migrant working in any of the member states except France, the family benefits relating to members of the family residing in another member state should be provided by the first member state (i.e. the state of employment) according to its own legislation. In the case of a worker in France, however, the family benefits were to be provided by the state of residence according to its legislation, although the cost would be borne ultimately by the competent French institution. Article 98 of the Regulation provides that the member states should re-examine the whole problem before January 1st, 1973 in order to reach a uniform solution.

The case of the family benefits is an interesting one. Family benefits, as we saw in the last chapter, constitute one of the major items of expenditure under the social security regulations. It is also

the item of expenditure under which the one-sided benefit for Italy is the most unequivocal<sup>(7)</sup>. In the dispute surrounding Article 73 we can see therefore a clear conflict between the demands of the labour-exporting country (Italy) and the refusal of one of the labour-importing countries (France) to accede to those demands. Italy, in the negotiation of Regulation No. 1408/71, refused to accept the generalised payment of family benefits at the rate provided for by the country of residence, as this would have been less favourable to Italy and the Italian migrants concerned than the alternative system. France's refusal to accept the system favoured by Italy constitutes in effect a refusal to transfer to Italy as much money as Italy demanded. The agreement of the other member states to Italy's demands can be explained, no doubt, by the fact that family allowances do not form as important an item of expenditure in those countries as they do in France.

The negotiations to find a uniform solution are still in progress. There are presumably many considerations which might influence the outcome of the negotiations, but one of the most important factors affecting the bargaining power of the two sides must be strength of the demand for Italian labour in France. If this is correct, then it will not be surprising if any uniform solution reached is along the lines proposed by France rather than those favoured by Italy.

Reluctance on the part of the labour-importing states to increase their expenditure on the social security regulations cannot, of course, be taken as an unambiguous reflection of a change in policy towards migrants: there are many other reasons why a state should show reluctance to increase its expenditure on these regulations, or indeed on many other things. The change in policy is likely to find its reflection more clearly, not in a growing reluctance to increase



expenditure, but in a change in the relative bargaining strength of the two sides, in a weakening of the ability of Italy to persuade the other member states to overcome this reluctance. If there is no real demand for labour, then Italy's bargaining position is considerably weakened, and, moreover, the other member states are unlikely to outbid one another in trying to attract migrants.

It is impossible to assert with any confidence that Regulation No. 1408/71 reflects a weakening of Italy's bargaining power, and that this can be attributed to the change in the migration policies of the other states. The compromise agreement embodied in Regulation No. 1408/71 was, after all, reached as early as November 1969, when the recent trend in migration policy had not yet become so clear. Nevertheless, it seems inevitable that the change in policy and the fall in the demand for labour will in the long run affect the development of the co-ordination of social security. In this respect, the outcome of the present negotiations on family benefits may give some indication of future trends.

The second possibility mentioned above was that the provisions of Regulation No. 1408/71 might reflect a preference for specific measures more appropriate to "integrating" migrants than to attracting them. The aim of such measures should presumably be to deter the uncontrolled entry of workers but to promote a certain stability among those who were already employed in the receiving state. The social security regulations could be manipulated to promote these aims. The pursuit of such a policy ought logically to lead, firstly, to a lack of generosity in the provision of unemployment benefits for workers going abroad to seek employment, and, conceivably, also to measures designed to facilitate reunification of families after the migrant has found work in the receiving state. The provision of improved unemployment benefits

met, we know, with strong German opposition in the negotiation of the new Regulation. The provisions on unemployment benefits are, indeed, less generous in some respects than those contained in the old Regulation. Whereas Article 35 of Regulation No. 3 allowed unemployment benefits to be paid for a maximum of four months after the unemployed worker had moved to a new state, the maximum period allowed by Regulation No. 1408/71 (Article 69 (1) (c)) is only three months<sup>(8)</sup>. It seems more than likely that Germany's opposition to any major improvements in this area was based not only on an unwillingness to pay more money but also on a reluctance to promote the uncontrolled migration of labour in search of employment. If our analysis of trends in policies towards migrants is correct, then the co-ordination of unemployment benefits is an area which is unlikely to see much development.

It is more difficult to see any direct link between the provisions on family benefits and an "integration" policy. It might be argued that the system proposed by the French, namely the provision of family benefits at the rate provided for by the country of residence rather than at that provided for by the country of employment, would have the effect of encouraging the reunification of families, but there is little evidence that this consideration has played any role in the negotiations.

The third way in which one might expect the legislative development of the social security regulations to be affected by the change in the policies of the northern states towards migrants is in the extension of the protection given by the regulations to cover new schemes and new categories of workers.

The initial proposal of the Commission for the revision of Regulation No. 3 included measures to extend the coverage of the regulation to "complementary" or occupational schemes, to "independent" or self-employed workers and to nationals of the member states living outside



the Community. All three proposals were rejected by the Council<sup>(9)</sup>. No reason was given for excluding the last category (Community nationals living outside the Community)<sup>(10)</sup>. The two more important extensions proposed were said to be rejected because of the technical complexity of the problems involved and because it was felt that the problems would be better dealt with in separate regulations. Now, more than ten years after the Commission began working on the revision of Regulation No. 3, work is said to be starting on the co-ordination of social security schemes for self-employed and non-employed workers, but there is no end in view to the difficulties either of this or of the co-ordination of "complementary" schemes.

It is true that co-ordination in both of these spheres raises considerable technical problems, largely because of the variations from one country to another in the pattern of protection and the lack of co-ordination (particularly of "complementary" schemes) which exists even at the national level; but the delay in dealing with the problems in these two very important problems surely suggests a lack of urgency. This lack of urgency, however, probably has little relation to the recent trend in migration policies. The co-ordination of provision for the self-employed does not directly impinge at all on the import or export of migrant labour. The co-ordination of "complementary" schemes is important in this respect, but it is clear that there are powerful economic interests which oppose such co-ordination not only at the international but also at the national level.

More recently, the question has arisen of extending the benefit of the Community regulations to non-Community migrants. At the moment, most of these migrants are covered by bilateral agreements between the receiving state and the state of origin, but the provisions of these

agreements are not usually as favourable to the migrant as the provisions of the Community regulations, and, in addition, a non-Community migrant who works in more than one member state of the Community is not adequately covered.

In its recent Social Action Programme<sup>(11)</sup>, the Commission has proposed that the three principles of the social security regulations (equality of treatment, conservation of acquired rights and conservation of rights in the process of being acquired) should be extended to cover migrants from outside the Communities. This proposal has not found much resonance in the Council and it seems unlikely that, in such a general form, it is likely to have much effect.

Of more significance are the negotiations with individual labour-exporting countries within the framework of Association agreements. In the case of Turkey, broad agreement has already been reached on the adaptation of Regulation No. 1408/71 to cover Turkish workers: such a measure was already provided for by Article 39 of the Association Agreement with Turkey<sup>(12)</sup>. Negotiations for similar steps to be taken to protect nationals of the Maghreb countries (Morocco, Tunisia, Algeria) are also in progress, again within the framework of more general negotiations concerning the Association Agreements with those countries<sup>(13)</sup>. It is likely that the recent "thawing" of the Association with Greece will also lead to similar negotiations.

Once again, it is difficult to relate the outcome of these negotiations to changes in the migration policies of the labour-importing states. It is clear that there will be very strong resistance to any extension of the Community system of free movement, other than that to which the Community is already legally committed<sup>(14)</sup>. The refusal to extend the system of free movement certainly does not preclude the extension of the social security regulations to nationals



of other countries, but, as in the case of Italy, it is inevitable that the bargaining power of the non-Community labour-exporting states will be weakened by a fall in the demand for migrant labour in the labour-importing states. This presumed weakening of the position of the Associated States is unlikely, however, to be reflected directly by the outcome of the negotiations, for, unlike the situation in the negotiations within the Community, these negotiations are being directly linked to negotiations on other topics. It is likely, therefore, that the degree of protection extended to non-Community migrants will reflect concessions given in relation to Arab oil or Greek wine rather than any change in the situation on the labour market.

Conclusion:

The aim of this chapter has been to see in what way changes in the influences and policies which brought the social security regulations into existence have been reflected in the judicial and legislative development of these regulations. The conclusion must be rather negative. It is very probable that the changes in migration policy have had some effect, particularly on the negotiations surrounding the legislative development of the regulations, but it is difficult - except perhaps in the case of unemployment and family benefits - to relate specific changes in the regulations to changes in migration policy. One can nevertheless detect certain tendencies in the direction of a decreasing interest in improving the protection given by the regulations. There are, of course, influences working in the opposite direction: pitted against these "external constraints" there is the "internal dynamic" of the regulations, represented in practice principally by Italy, the Commission and the Court. As we have seen, there are signs

that the influence of the "internal dynamic" may be on the wane.

Although the turn in the trend may not yet have had any clear impact on the shape of the Community regulations, there are already signs of change at the national level, in relation to the social security agreements of the most important labour-importing country, the Federal Republic of Germany. In view of - or perhaps using as a pretext - the improvements in the German family allowance system which come into force on January 1st, 1975, the Federal Government has unilaterally rescinded its agreements on the payment of family benefits with Spain, Portugal, Yugoslavia, Greece and Turkey. Instead of paying family benefits for children remaining in the country of origin at the rate current in the Federal Republic, as had been provided for in those agreements, the Government has offered to pay benefits at a fixed rate, which is in fact lower than that which was in force before January 1st 1975. The Governments of the labour-exporting countries have had little choice but to accept the German measure<sup>(15)</sup>. It is scarcely conceivable that the Federal Government will not use the current negotiations on the provision of family benefits under Article 73, Regulation No. 1408/71, to reach a similar result with regard to the family members of Italian migrants.

The conclusion, then, must be that, although the changing trend in migration policy has, as yet, left no unambiguous imprint on the provisions of Regulation No. 1408/71, there are strong indications that the trend will, before long, influence the legislative development of the Regulation. If the effect is to decrease the rights of the migrants, it will be very interesting what view the Court takes of the compatibility of such measures with the aims of Article 51 EEC, and particularly whether its interpretation will reflect any sympathy for the constraints of economic development<sup>(16)</sup>.



## CHAPTER 8

Chapter 8

Conclusion

The unity of the subject of this thesis, it was suggested in the Introduction, lay in the theme of social security in the EEC common to both parts of it. It should now be clear that this apparent unity of subject matter which brought the harmonisation and co-ordination of social security together in this thesis, as indeed in most other works on the subject, is largely illusory. Once the assertion is made that both Article 51 and Articles 117 and 118 deal with social security in the EEC and are the only provisions that do so, there is not very much else that can immediately be said to be true of both sets of provisions.

The duality of the subject matter is evident on the most immediate level, the level of legal analysis. The attempt in chapter two to examine the legal problems of Articles 117 and 118 in abstraction from the economic and political problems involved (as dictated by the method chosen) was of necessity slightly artificial and lacking in substance, because of the vague and open-ended nature of the provisions. Precisely the opposite was true of the law relating to the co-ordination of social security systems: there the law is of such complexity, political problems of so little immediate relevance, that there is ample scope for legal analysis. But not only is the style of the discussion of the problems of co-ordination and of harmonisation very different: it also is the case that the discussion in one area does not have very much bearing on the discussion in the other, that the solutions proposed in one area do not have very great relevance for the problems of the other.



If the duality of the subject matter is clear on the surface of the law, it appears to be just as great when an attempt is made to penetrate that surface, to examine the social function of the law. Behind the legal dispute surrounding the harmonisation of social security, there was revealed a political conflict, between the Commission and the member states on the one level, between the trade unions and employers on the other. Further study of this conflict led to the conclusion that the struggle and its outcome could be understood only in relation to the general intensification of the struggle surrounding labour costs in the mid-1960s, and that this in turn had to be seen in the context of the growing crisis of profitability in Western Europe since that period. The discussion of the social function of the co-ordination regulations initially led us along quite different paths, to consider the development and the mechanics of migration, international social security treaties, the effect of the social security regulations on labour migration, etc. And yet a theme which had appeared in the discussion of harmonisation reappeared in the discussion of co-ordination: the key to migration policies, and, in this instance, to the development of the social security protection of migrants - or, more precisely, the key to the strength of the various participants in the conflicts surrounding these policies - was to be found, it was suggested, in the development of the economy, or, more particularly, in the changes in the conditions of profitability, upon which the health of a capitalist economy ultimately depends.

The thrust of the argument is clear enough. The duality of which we have just spoken is as illusory, and as real, as the unity postulated in the introduction. Just as the original unity dissolved

on closer inspection, so too this apparent duality, this apparently complete separation of the two subjects, gives way to a new underlying unity. Both parts of our inquiry have led us to the conclusion that the provisions being studied must be understood as the products of a particular form of society, of a society whose well-being depends upon the successful pursuit of profits by autonomous and competing producers. Our study suggests that it is the demands created by this pursuit of profits, i.e. the necessity in a capitalist society to create an environment favourable to the profitability of private enterprise, which provide the key to an understanding of the development and application of these legal provisions. One of the most important of the factors which affect the profitability of private enterprise is the supply and cost of labour. The ultimate significance of both sets of provisions studied lies in their effect on the abundance and/or on the cost of the labour supply, and thereby on conditions of profitability. In this sense, the policies to which the two sets of provisions relate, i.e. incomes policy and migration policy, share the same aim and may indeed, as Kindleberger suggests<sup>(1)</sup>, be regarded as being in some degree alternative means of achieving that aim. The reasons which have made migration policies more restrictive and incomes policies more important in recent years have been discussed separately in chapters three and six, but it is evident that the two trends are closely inter-related.

The unity of the thesis, at its most basic level, lies in the fact that the two sets of provisions studied are but particular aspects of the same society and that their development is conditioned by the development of that society. Piercing the phenomenal form of the law, or rather of the two sets of legal provisions, has led us to



the same inner core, to the study of the structure of that society, the domain of political economy.<sup>(2)</sup> In so far as this is a conclusion, it is a stimulating one, one which introduces more than it concludes.

This unity is of course not merely the result of the inquiry, which in this respect has done no more than to render explicit what was already implicit in the method of approach, namely the assumption that these legal provisions were but particular aspects of a greater whole, and that it is the task of science both to comprehend them in their particularity and at the same time to transcend that particularity in grasping its relation to the totality. Given that there were two phenomena to be analysed, the presentation could not but lack unity. The task now, it might be argued, would be to reverse the process, to develop the particular from the totality, to present the unified flow of the totality into its diverse manifestations. But that would be to begin again (at a higher stage, perhaps?), to write as a political economist exploring the law, not as a lawyer trying to break his shell.

FOOTNOTES

Chapter 1

1. Cf. Lukacs (1971, p.14: "The knowledge of the real, objective nature of a phenomenon, the knowledge of its historical character and the knowledge of its actual function in the totality of society form ... a single, undivided act of cognition. This unity is shattered by the pseudo-scientific method".
2. On Weber's theory, see Lukacs (1971), pp. 95-97; Poulantzas (1965), pp. 256 ff.
3. For an elaboration of his theory, see Poulantzas (1965); for a shorter account, see Villey (1965), or Poulantzas (1966).
4. It might be objected that the subject matter is ill-suited to display the relation between the development of the law and the change in its social function, that it might have been better to choose a longer time scale and a legal concept of more central significance, as in Renner's classic study (Renner (1949)). Such an objection would, however, miss the point, for this is not an essay in applied legal theory, but an attempt to study certain legal provisions, adopting a particular method of approach.
5. Article 117 and Article 118 are contained in the chapter "Social Provisions" in the Title devoted to social policy; Article 51 is contained in the chapter devoted to the free movement of workers in the Title, "The Free Movement of Persons, Services and Capital". Both sets of provisions, however, are generally seen as aspects of the Community's social policy, and their implementation has been entrusted to the same Directorate General within the Commission, that responsible for Social Affairs (D.G.V.). To abstract these two topics from the general context of social policy is not as arbitrary as it might seem, for Community social policy has never in fact formed a coherent whole: the social provisions contained in the Treaty were included for a variety of reasons and grouped together within the Treaty only after they had been agreed upon.
6. The Dutch system forms a limited exception to this rule: from the late 1950's it has undergone several important reforms which bring it much closer to the Anglo-Scandinavian model.
7. On this, and on the evolution of the different systems, see especially Dupeyroux (1966).
8. The linguistic regime of the thesis must be explained. Quotations are generally included in the original language. Where the source has been published in a number of languages, the most convenient version has been quoted: in the case of Community documents, this is usually, though not invariably, French. Translations of all the major quotations in foreign languages are included at the end of the thesis.



## Chapter 2

1. And indeed real simplicity compared with the law relating to Article 51 EEC. Cf. Ch. 5.
2. Cf. Delannoo (1966). He defines "normes internationales" as follows (p.406): "Ce sont des règles prescrites ou recommandées par un organisme international aux divers Etats membres ..., afin d'introduire dans la législation des Etats membres certaines tendances, certains principes, voire même des règles minutieusement élaborées".
3. This is not entirely true: the first social security treaty, the Franco-Italian Treaty of 1904, is concerned, inter alia, with raising the standards of social protection in Italy. See below: Ch. 5, Ch. 6.
4. Text published in Ribas, Jonczy, Séché (1973), p.437.
5. Text published in Ribas, Jonezy, Séché (1973), p.408.
6. Such an approach was in fact proposed at one stage by the social committee of the European Parliament: see the Sabatini Report: Parlement Européen, Documents de Séance, 1965-66, No. 96, p.3.
7. Nederhorst Report: Parlement Européen, Documents de Séance 1965-66, No. 60, p.1.
8. It has been found convenient to quote the French versions of Articles 117 and 118 in the text because it is with reference to these versions that much of the discussion has taken place. The English version of Article 117 reads:

"Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained.

They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action".

Cf. Ch. 1, n.8.
9. Groeben-Boeckh (1958), p.447; cf. Wohlfarth (1960), p.638.
10. Cf. Les Nouvelles (1969), 2351.
11. Cf. e.g. Caesar (1964), p.229.
12. Cf. Cannella (1964), p.325: "Que l'harmonisation diffère de l'uniformisation d'un côté et de la coordination de l'autre est une chose évidente et reconnue par tous".
13. Quadri-Monaco-Trabucchi (1965), p.950.
14. Quadri-Monaco-Trabucchi (1965), p.950.

15. Wohlfarth (1960), pp. 366-367; for a reply to this argument see Quadri-Monaco-Trabucchi (1965), pp. 948-949.
16. Above, p.15.
17. Groeben-Boekh (1958), p.447.
18. Quadri-Monaco-Trabucchi (1965), p.949.
19. Kahn-Freund (1960), pp. 304-305.
20. Kapteyn-Verloren van Themaat (1970), p.293, provide an additional interpretation: "Bij 'de in het verdrag bepaalde procedures' zal men o.i. mede kunnen en moeten denken aan de procedures tot coördinatie van de economische politiek, waarvan de basis is vastgelegd in de artikelen 105 en 145, en van de andere bevoegdheden op economisch gebied" The significance of this approach is discussed in Ch. 4.
21. Cf. Wohlfarth (1960), p.367: "Unter den im Vertrag vorgesehenen Verfahren sind augenscheinlich alle sich direkt oder indirekt auf die Arbeitskräfte beziehenden Bestimmungen zu verstehen, also insbesondere die Artikel 48 bis 51, Artikel 118 und die Artikel 123 bis 128".
22. Thus the quotation above (pp. 18 ), ending "... dall 'attuazione delle procedure previste" continues: "... cioè da quegli istituti particolari che costituiscono la politica sociale comunitaria. Si tratta della libera circolazione delle persone, del funzionamento del Fondo sociale, dell'attuazione della politica comune di formazione professionale, della realizzazione della parità salariale maschile e femminile, della stretta collaborazione che deve instaurarsi tra gli stati membri nel campo sociale". Quadri-Monaco-Trabucchi (1965), p.949.
23. See No. 8 above. The English version of the relevant part of Article 118 reads:  
"Without prejudice to the other provisions of this Treaty and in conformity with its general objectives, the Commission shall have the task of promoting close cooperation between Member States in the social field, particularly in matters relating to:...  
- social security ...  
To this end, the Commission shall act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising at national level and on those of concern to international organisations. Before delivering the opinions provided for in this Article, the Commission shall consult the Economic and Social Committee".
24. Quadri-Monaco-Trabucchi (1965), p.951.
25. Wohlfarth (1960), p.368.
26. Article 213 provides: "The Commission may, within the limits and under the conditions laid down by the Council in accordance with the provisions of this Treaty, collect any information and carry out any checks required for the performance of the tasks entrusted to it". See No. 8 above, and Ch. 1, No. 8.



27. Quoted by Nederhorst: Parlement Européen, Documents de Séance, 1965-66, No. 60, p.4.
28. Cf., e.g. Seffen (1965), pp. 67-68.
29. Article 5 provides: "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.  
  
They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty".
30. Quadri-Monaco-Trabucchi (1965), p.951.
31. Caesar (1964), p.229.
32. Article 155 provides: "In order to ensure the proper functioning and development of the common market, the Commission shall: ...  
- formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary ...".
33. M. Leleux has explained the distinction in these terms:  
"la recommandation précise une conduite à tenir et elle équivaut à la directive sauf qu'elle n'a pas la force obligatoire de celle-ci; l'avis exprime une appréciation sur telle ou telle situation ou sur des méthodes et les moyens à mettre en œuvre pour aboutir à certains objectifs, à certains résultats".  
Quoted by Mégret (1973), p.8, n.3.
34. See below.
35. Cf. Nederhorst (1965-66), p.3; Les Nouvelles (1969), No. 2354. Art. 121 provides: "The Council may, acting unanimously and after consulting the Economic and Social Committee, assign to the Commission tasks in connection with the implementation of common measures, particularly as regards social security for the migrant workers referred to in Articles 48 to 51".
36. Cf. Nederhorst (1965-66), p.3; Kapteyn-Verloren van Themaat (1970), p.214; Seffen (1965), p.224; Les Nouvelles (1969), No. 2354. Art. 235 provides: "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures".
37. Cf. Wohlfarth (1960), pp. 365-366; Groeben-Boekh (1958), p.448; Quadri-Monaco-Trabucchi (1965), p.949.
38. Art. 100 provides: "The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by the law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market ...".

39. Cannella (1964), p.321.
40. Cf. e.g. Ribas (1965), p.11; Cannella (1964), p.323.
41. Cf. e.g. Quadri-Monaco-Trabucchi (1965), p.948; Ribas (1965), p.11.
42. This issue is discussed in Chapter 3.
43. Kapteyn-Verloren van Themaat (1970), p.294.
44. The measures mentioned specifically by Article 51 are not ~~ex~~clusive. This is clear from the French version, if not from the English translation.
45. Caesar, one of the few commentators who even suggests that Art. 51 might be used as a basis for harmonisation, nevertheless rejects this view on the basis that Art. 48 (2) limits the notion of "freedom of movement" to the "abolition of any discrimination based on nationality". But it is not clear that this is indeed the effect of Art. 48 (2), nor that any such limitation can apply to Art. 51, since both the measures specified in Art. 51 and the measures in fact taken in accordance with that article go beyond the abolition of discriminations based on nationality.  
Caesar (1964), p.227. And cf. Sabatini (1965-66), p.5.
46. Cf. Seffen (1965), pp. 68-69; (1967), p.225; Kapteyn-Verloren van Themaat (1970), p.294; Lyon-Caen (1969), p.140.
47. The directive on equal pay for women, which has now been published (OJ, 19.2.75; L.45/19), does indeed adopt a broad interpretation of Art. 100. One of the paragraphs of its Preamble reads:  
"Whereas implementation of the principle that men and women should receive equal pay contained in Article 119 of the Treaty is an integral part of the establishment and functioning of the common market".  
The implications for the preceding discussion are obvious.
48. Art. 101 provides: "Where the Commission finds that a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the common market and that the resultant distortion needs to be eliminated, it shall consult the Member States concerned. If such consultation does not result in an agreement eliminating the distortion in question, the Council shall, on a proposal from the Commission, acting unanimously during the first stage and by a qualified majority thereafter, issue the necessary directives. The Commission and the Council may take any other appropriate measures provided for in this Treaty".
49. Art. 102(1) provides: "Where there is reason to fear that the adoption or amendment of a provision laid down by law, regulation or administrative action may cause distortion within the meaning of Art. 101, a Member State desiring to proceed therewith shall consult the Commission. After consulting the Member States, the Commission shall recommend to the States concerned such measures as may be appropriate to avoid the distortion in question."



50. Cf. Art. 149 of the Treaty; and cf. Nederhorst (1965-66), p.3.
51. (1970), p.293.
52. Note that the discussion here is confined to consideration of the legal basis for general measures of harmonisation, and omits discussion of Art. 39 ff. and Art. 75 ff. which concern the specific areas of agriculture and transport.
53. 23.7.62; published in JOCE, 31.8.62; cf. Ribas-Hasse (1971), pp. 82 ff.
54. 20.7.66; published in JOCE, 9.8.66. Cf. Ribas-Hasse (1971), pp. 82 ff.
55. For a discussion of the implementation of these recommendations, see Ribas-Hasse (1971), pp. 83-85.
56. This is discussed at greater length in the next chapter.
57. For some details on ad hoc groups consulted by the Commission within the framework of Art. 118, see Nederhorst (1965-66), Annexe II (pp. 24-27).
58. For a fuller description of the Commission's studies, see Ribas-Hasse (1971), pp. 85-95.
59. Thus, Levi Sandri, for example, refers to "das mangelnde Gleichgewicht, das im Vertrag zwischen allgemeinen Zielen, die sehr wohl äußerst sozial definiert werden können, und den vorgesehenen Mitteln und Instrumenten für die Durchführung der Sozialpolitik besteht". Quoted by Seffen (1965), p.225.
60. We leave aside here Article 51, which has played almost no part in the discussion.

### Chapter 3

1. Cf. e.g. C.N.E.L. (1969), Heise (1966), Langendonck (1971), Lell (1966).
2. Veldkamp (1968), p.676; Seffen, that arch-enemy of the Commission's policy, is surely right when he insists: "der Vertrag sieht eben die Einigung Europas, die Errichtung des Gemeinsamen Marktes in höchstem Masse primär unter wirtschaftspolitischen Gesichtspunkten; er will eine ökonomisch funktionsfähige Wirtschafts-gemeinschaft. Für ihn spielen daher sozialpolitische Fragen nur eine untergeordnete Rolle". (Seffen (1967)), p.32. The emphasis is in the original.
3. Cf. e.g. Wohlfarth (1960), pp. 382 ff.
4. Cf. Dupeyroux (1971), p.890.
5. Primarily social security charges, but the argument embraces all costs resulting from "social legislation", including, for example, legislation requiring equal pay for women.
6. Ohlin (1956)<sup>9</sup>, cf. Meinhold (1957).
7. Cf. Veldkamp (1968), p.677; Ribas-Hasse (1971), pp. 78/79; CNEL (1969), p.80; Heise (1966), p.28. For further discussion of this problem, see below, pp.39ff.
8. Cf. Heynig (1969), 277.
9. Cf. Müller in Debats Parlementaires, 1-7-1969 (J.O.C.E. Annexe, No. 116, juillet 1969, p.91 at p.92).
10. Despite occasional statements which seem to indicate the contrary, such as that made by Levi Sandri (then member of the Commission responsible for social affairs) on 22-1-1964 in the Parliament: "Il ne fait aucun doute que les régimes nationaux actuellement en vigueur devront subir des adaptations progressives pour arriver un jour à se fondre en un système commun" (Débats Parlementaires 111/64, p.66 at p.69).
11. Cf. Ohlin (1956), Meinhold (1957), Knölwe (1958).
12. This was in fact the conclusion reached by a study conducted by the Statistical Office of the Commission. This study found that total labour costs in the countries with the highest social charges were below the average. Cf. Commission (1968).
13. Cf. Schork (1966), p.83.
14. For some reason the notion of social security benefits as an indirect, deferred or socialised wage does not appear to be widely employed by students of social administration in Britain. It is possible that the high degree of state participation in the financing of the British scheme and the fact that the British system was extended at an earlier date beyond the protection of wage-earners has obscured the relationship between wages and benefits.



15. Montes (1965), p.17. Hence the remark he quotes with approval: "La sécurité sociale française a été avant tout une victoire de la classe ouvrière, sur elle-même."
16. Meinhold (1964) (1) reaches the same conclusion. The Commission too (1970, § 422) finds the difficulties which arise in making the distinction in practice "virtually insurmountable".
17. Cf. Delpérée (1966), p.823.
18. Schork (1966), pp. 83 ff.
19. Cf. Meinhold (1964 (1)), Schork (1966) 87 ff. Commission (1970) § 421.
20. The obvious example is the coal industry.
21. Cf. Meinhold (1964 (I)), p.3; Schork, pp. 90 ff; Commission (1970) § 421.
22. These are the conclusions of Meinhold's excellent and influential article (1964 (1)).
23. After the first year or two (cf. Lifard (1965)), the French do not seem to have pressed their case very strongly. By the time of the 1962 Conference, the employers of all countries seem to have been very much on the defensive.
24. Cf. Ribas-Hasse (1971).
25. Thus Levi Sandri in a speech to the Parliament as early as 1961: *Débats Parlementaires*, 22-11-1961, IV/62, No. 48, p.134 at p.142. Ribas, Director for Social Security and Social Services at the Commission, made the point equally clearly in a pamphlet published by the Commission in 1965: "The approach to harmonisation cannot be purely economic: it cannot just aim at eliminating distortions of competition ... It is doubtful whether this approach can justify any but sporadic interventions by the Community in social policy" (Ribas (1965) p.11). Cf. also Van Praag (1968), p.259.
26. Ribas-Hasse (1971), p.81.
27. Cf. Meinhold (1964 (2)).
28. M. Veillon was at the time secretary-general of the "moderate" socialist CGT-FO. It appears (from interviews) that the trade union organisations deliberately sought to have M. Veillon named as the Rapporteur at the Conference on the general subject of social security benefits, and that the views expressed by M. Veillon represented the position of the trade unions. It was partly because of this report that the member states refused to participate in the Conference.
29. Conférence européenne ... Vol. 1, pp. 195 ff.

30. As is evidenced by the mere titles of some German articles which appeared at the time: "Die diktatorische Gleichmacherei des Monsieur Veillon" (Köhler (1962)) and "Sind Nivellierung und Superbürokratie europäisches Schicksal? Zu den Harmonisierungstendenzen in der EWG" (Meenzen 1962). Cf. also the co-report by Erdmann and Rosoux at the European Conference: Vol. 1, pp. 239-246.
31. A. Miller (1963), p.36, calculates that the fulfilment of Veillon's demand involves a 75% increase in social security expenditure in the Federal Republic. For the other member states, the increase would be even greater.
32. A. Miller (1963) p.36; Meinhold (1964 (2)), p.364.
33. Cf. e.g. Heise (1966), Cannella (1964).
34. Thus Lawson (1973) p.701: "If, in these respects, we have something to offer some of the other countries we undoubtedly also have some important lessons to learn".
35. This is confirmed by Delpérée (1967), p.1565. Pointing out that trade unions have failed to organise themselves effectively on the European level, he remarks: "Cela ne signifie pas que les syndicats n'ont pas utilisé les Communautés pour résoudre des problèmes nationaux. On pourrait dire que les Communautés ont, dans un certain sens et dans certains cas, élargi les possibilités de l'action syndicale nationale ... C'est tellement vrai que certains gouvernements reprochent à la Commission économique européenne d'avoir utilisé à leur égard les syndicats comme groupes de pression". And cf. Schmatz (1965), col. 292.
36. Titmuss (1971).
37. The Guardian, January 3rd, 1972.
38. Above, p.35.
39. Ribas-Hasse (1971), p.82.
40. Ribas (1965), pp. 11-12.
41. Cf. Levi Sandri, Débats Parlementaires, 1-12-1967, 1/68, No. 96, p.194.
42. Cf. e.g. Hoernigk (1963); Alexander (1962); Schmatz (1963), A. Miller (1963); Meenzen (1962); Deutsches Ärzteblatt (1964).
43. Cf. Heynig (1969) 228.
44. It seems that the refusal of the member states was immediately related in part at least, to the nature of the demands made in the Veillon report.  
See fn. 28 above.
45. The EEC, the ECSC and Euratom.
46. Cf. Conférence européenne ... Co-rapport Erdmann-Rosoux, pp. 239-346 and passim.



47. Although the member states took a common stand against the Commission as early as October 1963: see the Nederhorst report: *Parlement Européen, Documents de Séance, 1966/66, No. 60, p.9, § 34.*
48. Cf. Schmatz (1965), col. 292.
49. Cf. Heynig (1969); Veldkamp (1968).
50. *Débats Parlementaires, 1-12-1966, 1/67, No. 88, pp. 206-227, esp. at pp. 206-8, 227.*
51. Cf. Seffen (1967), p.32., and see the Nederhorst report referred to in Note 47 above.
52. Cf. Veldkamp (1968), p.678.
53. *Débats Parlementaires, 16-6-1965, IX/65, p.141.*
54. Cf. Seffen (1966).
55. It is clear, however, that Mr. Veldkamp's efforts were not being made in a vacuum. During the period of crisis, changes were taking place in the attitudes both of the Commission and of the trade unions. Both bodies gradually came to realise that it was necessary to adopt a more "realistic" attitude. The representatives of the trade unions also worked actively to prepare the "Veldkamp compromise".
56. Cf. Veldkamp (1968), p.678.
57. Veldkamp (1968), p.680.
58. Above, pp. 44 ff.
59. Cf. Coppé, *Débats Parlementaires, 6-10-1970, No. 128, Oct. 1970, p.35.*
60. Cf. *Débats Parlementaires, 25-1-1968, 111/68, no. 98, pp. 189 ff; 1-7-1969, no. 116, juillet 1969, pp. 75-6, 84; 6-10-1970, No. 129, Oct. 1970, p.21.*
61. *Débats Parlementaires, 2-7-1968, No. 105, juillet 1968, pp. 50-56.*
62. The complaints of the Parliament, that the Council is neglecting social policy, continue. In 1968 there was apparently an attempt to limit the Commission's contacts with the "social partners"; a demand was also made by the member states that the Commission should obtain the prior approval of the Council before asking independent experts to help with its study projects, and that the studies should not be published unless the Council gave its approval. When questioned on this in the Parliament, both the Council and the Commission denied that there had been any limitation of the Commission's powers under the Treaty (*Débats Parlementaires, 14-5-1968, No. 103, mai 1968, pp. 90-96*).
63. These institutional restrictions on the freedom of the Commission must be seen, not only in relation to the conflict over social policy, but also as part of the general restriction of the activity of the Commission in the wake of the crisis of 1965 and the Luxembourg Agreement of January 1966.

64. Thus, in a debate in the Parliament in October 1970, Mlle. Lulling urged that the recommendations on maternity and invalidity still shelved with the Council, should at least be issued by the Commission, thus shifting the responsibility of compliance on to the member states: to this, Coppe, then member of the Commission responsible for social affairs, replied that the Commission had already fulfilled its responsibilities by proposing the recommendation to the Council, but that it had not been accepted by that body (*Débats Parlementaires*, 6-10-1970, no. 129, oct. 1970, p.35). This, of course, makes nonsense of the idea of a recommendation under Article 155: instead of being a public external act, it becomes a private internal transaction between two institutions of the community. In practice, the Commission has abandoned the idea of using recommendations in this area.
65. Cf. Heise (1968).
66. In discussing the debate concerning the aims of harmonisation, I have not considered it necessary to deal with the argument that harmonisation is necessary in order to promote the free movement of labour. It is sometimes argued that it is impossible to co-ordinate the various social security systems satisfactorily in order to protect migrants (in accordance with Article 51), while significant disparities continue to exist between the systems being co-ordinated. (Cf. Resolutions of Parliament and ESC on proposed reform of Reg. 3). While this is no doubt true, migrants' rights are already protected by Art. 51 and regulations made thereunder and it would be unrealistic to expect member states to alter the structure of their social security schemes radically in order to bring a small additional benefit to a very small number of migrants. This view is confirmed by interviews in the Commission. Although the argument that harmonisation is a necessary pre-condition for efficient co-ordination is regularly advanced when the administration of co-ordination runs into difficulties, it was felt by the interviewee that this argument is not taken seriously by anybody, and that it would not have any influence in persuading member states to harmonise their legislations.

The other argument which links harmonisation with the free movement of labour is that disparities in social security schemes lead to distortions on the European labour market, attracting migrants to countries with high benefits and thus giving a competitive advantage to the employers of those countries. This is surely merely a variation on the competition argument analysed in the text and suffers from the same defects.

Concern for migrants has nevertheless played a certain part in the Commission's work on harmonisation. This was one of the main influences which led to the Commission's recommendations on industrial illness and its proposed recommendation on invalidity (cf. Levi Sandri, *Débats Parlementaires*, 25-1-1968, 111/68, No. 98, p.196): it seemed particularly unjust and without reason that a person should be considered an invalid in one country and not in another, or that his disease should be recognised as an industrial disease in the one, but not the other.

67. In fact the "defeat" of the Commission appears to have been spread over four Council meetings; those of December 1966, June 1967, December 1967 and February 1968: Seffen (1968), pp. 135-136.



68. It would be wrong, however, to think of the new policy as being simply imposed by the Council on a homogeneous and hostile Commission. There was, from the start, opposition within the Commission to the policy described in the previous section of this chapter. As the failure of the policy became more manifest, this opposition naturally grew. The opponents of the policy within the Commission regarded it as legalistic and unrealistic, and favoured a more economically realistic approach. The outcome of the Veldkamp compromise thus corresponded to the wishes of these sections of the Commission and linked up with work already in progress. Within the Commission, the change to the new "realistic" policy is seen as a defeat for the lawyers, the liberation of the economists from the rule of the "juriste". This chapter suggests that the conflict in fact went much deeper than that.
69. For an analysis of the conclusions of these studies (on the economic impact of social security; on the financing of social security in agriculture; and on the financial problems of social security) and the Council's decision of 26-11-1970 on the elaboration of a social budget, see Commission (1971 (1)).
70. Cf. Heynig (1969), 228.
71. See below, pp. 72 ff.
72. Cf. Veldkamp (1969), p.184.
73. Cf. Lell (1966), esp. Pt. 2.
74. Cf. Meinhold (1964 (2)), p.365.
75. Cf. Coppini, Conférence européenne ... vol. 1, p.186, § 122.
76. Frisch (1965), p.548.
77. Lell (1969), pp. 149-150.
78. Meenzen (1962).
79. Meenzen (1962), p.185.
80. Meinhold (1964 (2)).
81. Meinhold was one of the experts responsible for the German Sozial-enquête, as also for the Commission's report on the "Economic Impact of Social Security". See below, p.73.
82. Meinhold (1964 (2)), p.365.
83. Meinhold (1964 (2)), p.365.

84. As Mannoury puts it in a discussion on the rise in social expenditure in the Netherlands: "Een stijging van de sociale lasten zegt voor de volkshuishouding dus evenmin iets als voor een particulier huisvader bijvoorbeeld een sterke toeneming van zijn uitgaven per giro in tegenstelling tot die per kas. Zulk een toeneming, hoe sterk ook, is op zichzelf niet zorgwekkend ..." (Emphasis in the original). Mannoury in Berends and De Heij (1968), p.40.
85. Thus, for Belgium cf. e.g. Delpérée (1966 (2)); for France: Dupeyroux (1966); for the Netherlands: Berends and De Heij (1968), Hartog (1969) 179; for Germany: Müller (1969).
86. Delpérée (1966), p.819.
87. Müller (1969), p.25.
88. Müller (1969), pp. 17-18.
89. Published by the Frankfurter Allgemeine Zeitung.
90. Müller (1969), pp. 19-20.
91. Dupeyroux (1972), p.4.
92. The argument in this paragraph is borne out by the argument of Glyn and Sutcliffe (1972), ch. 4 and by the figures they provide. See Table 1 and Figure 1 at the end of this chapter.
93. By "wage quota" I refer to the share of the national income going to wage and salary earners. By "wage ratio" I understand the ratio of wages to total incomes.
94. Cf. Müller (1969), p.32, n. 55; p.37, n.72; Delpérée (1966), p.822.
95. Müller (1969), p.32.
96. Cf. Mandel (1969), Ch. 2.
97. Cf. Mandel (1969), Ch. 2.
98. Cf. Ulman and Flanagan (1971), p.159.
99. Cf. Ulman and Flanagan (1971), p.203.
100. Cf. Delpérée (1966), p.822.
101. Though in the Netherlands the problem arose in a different context because of the incomes policy which had been in force since the War. However, not even this could prevent the wage explosion (1963-64) which followed the attainment of full employment in 1960. Cf. Ulman and Flanagan (1971), p.80.
102. This is pointed out by Meinhold (1964 (2)) and by the German Sozialenquete report. Cf. Müller (1969), pp. 31-32.



103. Or indeed to hoarding or some form of non-productive speculation. The consequences, for our purposes, are similar.
104. Cf. Miller (1969), p.32.
105. Cf. Mandel (1972), p.461; for links between investment and the fall in profitability in the EEC countries during the 1960's see Glyn and Sutcliffe (1972), p.99.
106. Cf. Dupeyroux (1966), p.110. Not only the retention of domestic capital but also the attraction of foreign capital is involved.
107. Above, p.61. For translation, see translations for p.61.
108. On the relation between incomes policy and the supply of migrant labour, see Kindleberger (1967), Ch. 11.
109. Anyway, the British experience of 1970-71 indicates that, where trade union solidarity is strong, unemployment may not lead to a reduction in the growth of wages, cf. Mandel (1972), p.143.
110. To make them more effective, incomes policies are often accompanied by measures aimed at weakening the power of trade unions. Cf. Mandel (1972), pp. 216-219.
111. Because they are an alternative to unemployment, incomes policies are often associated with "left of centre" government. Cf. Ulman and Flanagan (1971)), p. 209.
112. Commission (1971 (2)), pp. 82-83. The latest figures are for 1968, but the clear trend at that time was for this proportion to rise. See Table 2 at the end of this Chapter.
113. Commission (1971 (2)), p.50: figures from 1959.
114. Glyn and Sutcliffe, although they make no use of the notion of "indirect wage" (foreign to the British analysis of social security), do relate reductions in social security expenditure to incomes policy in the UK as elements of the Government's policy to combat the fall in profits: Glyn and Sutcliffe (1972), pp. 161-162.
115. Delpérée (1966), p.812; A. Miller (1963), p.36, etc.
116. Meinhold (1964 (2)), p.364; and cf. Köhrer (1962), p.276.
117. Cf. François-Poncet (1970), pp. 110 ff; Hufschmid (1972), esp. pp. 111 ff.
118. Cf. Berlé (1970), p.11.
119. Cf. Ulman and Flanagan (1971), pp. 200 ff.
120. Cf. Exposé Social 1969, pp. 162-163.
121. Cf. Ulman and Flanagan, pp. 147 ff.

122. Cf. Exposé Social 1965, pp. 179-180; Note that in the V<sup>e</sup> Plan, "cotisations sociales" are grouped with "salaires" under the heading "La répartition des revenus": V<sup>e</sup> Plan, pp. 188 ff.
123. For the Netherlands, see Berends and De Heij (1968): the Roolvink memorandum followed the wages explosion of the mid-1960s. (Cf. Ulman and Flanagan (1971) pp. 48 ff); for social security planning in Belgium, see Delpérée (1966).
124. Cf. e.g. Exposé Social 1965, p.158.
125. Exposé Social 1966, p.113, 131, 132.
126. Levi Sandri, Débats Parlementaires 1-12-1967, 1/68, no. 96, pp. 192-196.
127. Levi Sandri, Débats Parlementaires 13-3-1968, mars 1968, no. 101, pp. 61-67. An English summary can be found in International Social Security Abstracts, 1969, no. 1; the point is repeated in Exposé Social, 1968, p.18.
128. As has already been pointed out (above, p.63), the problem in a capitalist society is not as simple as Levi Sandri makes it appear.
129. Levi Sandri, Débats Parlementaires, 13-3-1968, mars 1968, no. 101, p.67.
130. Social Report, 1971, p.189. And see also Commission (1971 (1)), where the same thing is said.
131. Commission (1971 (3)).
132. J.O.C.E., 30.5.1969, no. L129/95.
133. J.O.C.E., 30.5.1969, no. L129/95.
134. The same point is made by Stock (1972) at p.80: "Noch ein weiterer Gesichtspunkt ist bei der Einkommenspolitik zu berücksichtigen; all das, was man unter dem Begriff der sozialen Sicherheit zusammenfasst ...".
135. Cf. Seffen (1965 (1)), pp. 67-68; Seffen (1967), p.32.
136. Cf. Heynig (1969) 229. And Cf. Draperie (1971), p.76.
137. There is little evidence to suggest that changes in the party-political complexion of the various governments have had much influence on the formation of policy in this area.
138. Seffen (1967), p.32. Even Seffen, the most grudging of all the Commission's critics, finally welcomed the change in the Commission's policy. His article of June 1968, entitled "Deutliche Mässigung der Brüsseler Harmonisierungspolitik", begins: "Man kann geradezu von einer Umkehrung der Fronten sprechen ...". He goes on to praise "die neue und begrüßenswerte realistische Sicht der Harmonisierung" and mentions with



approval the emphasis in the social report of 1967 on the "Notwendigkeit einer Verbindung der sozialen und der wirtschaftlichen Ziele". Seffen (1968).  
Another bitter opponent of the Commission's early policy, Köhrer (the author of "Die diktatorische Gleichmacherei des Monsieur Veillon") is also favourable to the change in policy. He too welcomes particularly the emphasis on the necessity to relate social and economic policies: "Das klingt glücklicherweise etwas anders als die seinerzeitigen Veillon-Vorschläge" ... Köhrer (1969), p.105.

139. Supra, p.66.
140. Of which Berlé (1970) says (p.8): "Dieser Vortrag wurde zum Ausgangspunkt der wissenschaftlichen Bemühungen, die Sozialleistungen transparent (überschaubar) und ihren Standort in gesamtwirtschaftlicher Sicht deutlich zu machen".
141. Mackenroth in Kilp und Schreiber (1971), p.269.
142. The double-edged nature of social security forecasts is made clear by a recent German report. The report points to the danger that these forecasts can, in their present form, lead to "Politische Fehlentscheidungen": "Diese Gefahr ist dann am Größten, wenn derartige Vorausberechnungen Überschüsse ergeben, die politisch erwünschte Möglichkeiten erweiterter Leistungsgewährung anzuzeigen scheinen. Die Vorausberechnungen der Bundesregierung sind denn auch immer wieder als echte Prognose missdeutet und so zur Grundlage ausgabewirksamer Forderungen und Entscheidungen gemacht worden". Wissenschaftlicher Beirat 1973, p.157f.
143. Cf. Mandel (1972), ch. 7, esp. at pp. 219 ff.; and cf. Galbraith (1967), ch. 2.
144. Cf. Morrell (1972), ch. 7; and cf. UNICE (1973), p.13.
145. Cf. Veldkamp (1969), p.184.
146. Cf. Commission (1970), esp. ch. 3 and ch. 6. In so far as rises in labour costs are passed on to prices, the squeeze on profits referred to in the argument on pp. 32 ff. does not of course come about. In an international economy, however, inflation provides no solution to the problem, for exports, the balance of payments and monetary stability all suffer. Thus, Glyn and Sutcliffe (1972), p.73, speak of profits being "squeezed between the pressure of wages and international competition".
147. The relation between the Common Market, labour costs, social security costs and social security planning emerges clearly from a declaration in 1961 by the French employers' organisation, the CNPF (Conseil National du Patronat Français). The report begins: "Au moment où, à un tournant particulièrement difficile de la conjoncture économique internationale, l'Economie française doit en outre, pour répondre aux exigences particulières du Marché commun, procéder à une révision extrêmement sévère de tous les éléments qui peuvent contribuer à alourdir au-delà de ses possibilités concurrentielles le prix de revient de ses produits, la progression toujours plus considérable du coût de la Sécurité

Sociale provoque les inquiétudes les plus vives". The declaration goes on to insist on the necessity of established long-term forecasts of social security expenditure: CNPF (1965), pp. 105-108.

148. Hence the German provision that pensions should follow wages with a time lag of three years.
149. Commission (1970), § 563.
150. Commission (1970), § 565.
151. Not surprisingly, since Meinhold, who drafted this section of the Sozialenquete, was also a member of the committee responsible for the Commission's study.
152. Sozialenquete, p.142. The English version of the Commission's study quotes this in English, but the translation is not as clear as the original.
153. Thus, the change in the direction of Community policy must be seen not just as a reflection of national policies, but also as a result of the growing importance of the development of a concerted Community economic policy. This, incidentally, makes more relevant the original French argument concerning competition as it becomes more important to maintain monetary stability.
154. Commission (1970).
155. See n. 54 above. And of. Commission (1971) (4).
156. Cf. Ribas-Hasse (1971).
157. See the Council's decision on the elaboration of a European social budget, reproduced in the Annexe of Commission (1971 (1)). The first Social Budget has already been submitted to the Council, but it is not proposed to publish it, partly because inflation has already rendered obsolete the figures on which it was based. The first Social Budget contains three headings of which the first is the most important: social security, social assistance and benefits for war victims. It is hoped gradually to extend it to all forms of social expenditure and to have an annual sliding budget.
158. This does not mean that the European social budget does not (like its national counterparts - see p.71 and n. 142 above). have a two-edged nature. On the contrary, the ambiguous nature of the European undertaking is much stronger, for a coherent comparison of the social expenditure of the member states may well give added force to demands made in the states which have a less well developed system of social services. It is possible that the social budget may give life again to controversy which, in this area, has been dead since 1966.
159. Cf. Montes (1965), p.17.
160. Above, p.62.



161. Montes (1965), p.18.
162. Meinhold (1964 (2)).
163. Meinhold (1964 (2)), p.364.
164. The extent to which this will actually happen in any given situation depends on a host of factors not considered, including the question whether similar developments are also taking place in other countries.
165. For both the French and the German governments.
166. This illustrates the change that has taken place in German policy on harmonisation in the last ten years.
167. Ribas (1973), p.210.
168. Commission (1973): Actions III5, III6, III0, III9 respectively.
169. Ribas (1973), p.214.
170. Ribas (1973), p.214.
171. For the implementation of these Recommendations by the member States, see the annual Social Reports of the Commission.
172. Cf. Ribas-Hasse (1971), p.81.
173. Cf. Ribas-Hasse, pp. 81-82.
174. Coppe, Débats Parlementaires, 10-5-1972, no. 150. mai 1972, p.89; Commission (1971) (4); and see Table 3 at the end of this chapter.
175. Above, n. 69.
176. By a series of reforms (Algemene Weduwen-en Wezenwet (AWW) of 1959; Algemene Ouderdoms Wet (AOW) of 1957), the Dutch converted important parts of their social security scheme into a national system providing a basic flat rate coverage for everybody. A law of 1967 (Algemene Wet Bijzondere Ziektekosten (AWBZ)) abolished the distinction between industrial injury benefits and sickness benefits. At no time were the Dutch reforms openly opposed by the Commission.
177. Cf. Rodgers (1973); Titmuss (1971); Caesar (1964), p.229.
178. An untimely Italian proposal of 1971 to harmonise benefits met with some surprise and not very much enthusiasm in the Commission.
179. Meinhold (1964 (1)); above, p.41.

180. Ribas (1973), p.214.
181. It is sometimes argued that the effect of "harmonisation" cannot but be beneficial. Thus, for example, Shirley Williams states: "What is abundantly clear in the social services is that the EEC principle of "harmonisation upwards" can only benefit Britain because she has slipped so far down the list in social service provision". (Williams (1973), p. 400). It is arguable that the effect on Britain may be beneficial but it is certainly not "abundantly clear".
182. On the relation between Community decisions on social policy and public debate, a passage from the latest UNICE Memorandum on social policy throws an interesting light: "All countries in Europe are at present faced with the acute problem of inflation, of which one of the main causes is too great an increase in wages and salaries. It is conceivable that a dialogue on this subject with the trade union organisations, should they wish to take part, would be less heated and consequently more fruitful at European level". UNICE (1973), p.7. Perhaps it is this relative isolation from social pressures which provides the key to an understanding of the Community's social policies. See pp. 53 -54 above.



Chapter 4

1. Wohlfarth (1960), p.366.
2. See Chapter 3 above.
3. Cf. e.g. Levi Sandri, quoted by Seffen (1965 (2)), p.225; Ribas (1965), pp. 11-12; Levi Sandri in Conférence Européenne (1962), Vol. 1, p.46.
4. Conférence Européenne (1962), Vol. 1, p.196.
5. Cannella (1964), p.322; also Conférence Européenne (1962), p.322.
6. Conférence Européenne (1962), p.745.
7. Or perhaps, more accurately, for the German social insurance institutions: for the purposes of our discussion, the two coincide.
8. (1965), p.67.
9. An exception must, of course, be made for the Italian government which supported the Commission. On the position of the Italian government, see Nederhorst (1965-66), Annexe 1.
10. Conférence Européenne (1962), Vol 1, p.706.
11. Seffen (1965 (1)).
12. To these might be added another general work on the law of the EEC: "Einführung in die Rechtsfragen der Europäischen Integration", published by the Gustav-Stresemann - Institut. The chapter on the law relating to social policy is written by Schlotfeldt, "Geschäftsführer in der Bundesvereinigung der Deutschen Arbeitgeberverbände", one of Germany's main employers' organisations. Not surprisingly, Schlotfeldt favours a narrow interpretation of the Commission's competence. Schlotfeldt (1967). It should be noted that many of the other legal commentaries, (e.g. Les Nouvelles, Mégret, Lyon-Caen) reproduce the arguments without taking any clear position.
13. Kapteyn-Verloren van Themaat (1970), p.292.
14. Kapteyn-Verloren van Themaat (1970), p.293.

Chapter 5

1. Cf. Ribas-Voirin (1969), p.855: "La sécurité sociale des travailleurs migrants est un sujet réputé ardu que seuls, dit-on, quelques rares spécialistes seraient à même de dominer dans chaque pays".
2. Ribas-Voirin (1969), p.855, n. 1; Cf. Fiorenza (1970), p.12.
3. Ribas-Voirin (1969), p.585, n. 1: "Quant aux mouvements de fonds correspondants, ils sont évalués pour 1967 à près de ... 140 millions d'unités de compte. A cette somme, il convient d'ajouter le montant des prestations servies par les différents Etats membres aux ressortissants des autres Etats membres, en application de la législation interne." For more details, see chapter 6.
4. All the examples in this section describe the situation under national law, i.e. in the absence of any form of international co-ordination.
5. Cf. Lyon-Caen (1969), pp. 30-34; Haute Autorité (1966), pp. 43-51.
6. Cf. e.g. Art. L245 of the Code de la sécurité sociale (France); Article 231 of the anrete loi of 28.12.1944 concerning the social security of workers (Belgium); Art. 3 of the law of 5.6.1913 on sickness insurance (Netherlands), etc. Haute Autorité (1966), pp. 29, 43, 73.
7. Cf. Lyon-Caen (1969), p.30.
8. Haute Autorité (1966), p.74.
9. Art. 6, 40 de la loi du 2.5.1955 relative à la pension de retraite et de survie des ouvriers, and Art. 1 de l'arrêté royal du 19.12.1955. Haute Autorite (1966), p.29.
10. Lyon-Caen (1969), p.28.
11. Haute Autorité (1966), pp. 44, 59; Lyon-Caen (1969), pp. 30-31.
12. Lyon-Caen (1969), p.28, Hanotiaam (1973), p.44.
13. Netter (1959), pp. 388-390; Rouast-Durand (1961), p.241.
14. Cf. Haute Autorité (1966), p.35.
15. For more details on residence restrictions in the various members states, see Haute Autorité (1966), passim; Commission (1962), pp. 116-117; Lyon-Caen (1969), pp. 31-34; Netter (1959), pp. 388-393.
16. Cf. e.g. Commission (1962), p.117; Haute Autorité (1966), p.4 and passim.
17. Cf. Haute Autorité (1966).
18. Cf. Lyon-Caen (1969), pp. 61-70; Rouast, Durand (1961), p.238.
19. Martí Bufill (1967).



20. Cf. Commission (1962), pp. 118-119; Ribas (1969), pp. 151-154; Rouast Durand (1961), pp. 247-250; Netter (1959), pp. 405-408; Delpérée (1956), pp. 170-175.
21. Thus, in treaties concluded in France, for example, state-financed pension schemes (where nationality restrictions are most common) are rarely covered. Cf. Rouast, Durand (1961), p.244.
22. Cf. Delpérée (1956), pp. 166-167; Netter (1959); pp. 393-394; Rouast Durand (1961), p.244.
23. Haute Autorité (1966), pp. 42, 57, 72.
24. Rouast, Durand (1961), pp. 245-247; Netter (1959), pp. 395-398.
25. "Terme un peu barbare mais commode": Voirin (1968), p.335.
26. Cf. Netter (1959), pp. 400-405; Rouast, Durand (1961), pp. 244-245.
27. Cf. Netter (1954), pp. 394-395; Rouast, Durand (1961), pp. 243-244.
28. Cf. Rouast, Durand (1961), pp. 247-248; Delpérée (1956), pp. 170-171, 182-184; Netter (1959), pp. 405-406; Commission (1962), p.119.
29. Cf. Commission (1962), p.119; for more precise information on the lacunae of a number of bilateral arrangements, see Haute Autorité (1966).
30. There were nearly 200,000 foreign workers working in the coal and steel industries of the ECSC. Cf. Lyon-Caen (1969), p.290.
31. This is chapter 1 (Workers) of Title III (The free movement of persons, services and capital) of Part Two (Foundations of the Community) of the Treaty.
32. It has been found convenient, for the purposes of the discussion, to quote Article 51 in French. The English version reads:  
"The Council shall, acting unanimously on a proposal from the Commission, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for migrant workers and their dependants:  
(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;  
(b) payment of benefits to persons resident in the territories of Member States".
33. The two regulations are published together in J.O.C.E. 16.12.1958.
34. J.O.C.E. 20.4.63.
35. J.O.C.E. 24.7.63.
36. Reg. 47/67 of 7.3.67. Published in J.O.C.E. 10.3.67.

37. On the origins of Regulation No. 3, see Lyon-Caen (1969), pp. 289-294; Rouast, Durand (1961), pp. 250-253; Ribas (1969), pp. 154-155; Delpérée (1956), pp. 177-178; Commission (1962), pp. 119-120. The question is considered from another angle in the next chapter.
38. Lyon-Caen (1969), p.294.
39. But note that more favourable provisions had been granted by some bilateral agreements; Delpérée (1966) (1) suggests that there is little ground for enthusiasm about this chapter of Regulation 3, particularly in view of the fact that Article 41 can have an adverse effect on the rights granted by some bilateral treaties.
40. See the previous note.
41. Cf. the Torrekens case (28/68).
42. See Table 1 at the end of this Chapter.
43. Rec. X, p.362.
44. Rec. X, p.573.
45. Above, p.104.
46. Cf. Rouast, Durand (1961), p.253; Lyon-Caen (1969), p.319.
47. Rec. XV, p.597.
48. For the texts of Art. 11(2), see the Appendix to this Chapter.
49. Rec. XV, p.602.
50. Rec. XV, p.603. My emphasis.
51. Rec. XII, pp. 399-400.
52. Lyon-Caen (1968), p.152.
53. Rec. X, p.1124.
54. Rec. XIII, p.276.
55. The expression used in Art. 4, Regulation No. 3.
56. Case 26/62, Van Gend en Loos; Rec. IX, p.1.
57. Rec. X, p.557.
58. Rec. X, p.574.
59. Seche (1968), pp.488-490.
60. Lyon-Caen (1965), pp. 88-90.
61. Rec. XVI, p.171.



62. Rec. XVI, p.179.
63. Rec. XIII, p.445.
64. In this sense: Séché (1968), p.489.
65. As is the case in many bilateral treaties.
66. Rec. XI, p.III.
67. Rec. XI, p.131.
68. Quoted from the judgment in the Bertholet case. Rec. XI, p.118. These Art. 52 cases are of course but one example of the Court's generosity in extending the protection of the regulations to cover as many persons as possible. See below p.152.
69. Louis (1965).
70. Case 26/62, Rec. IX, 1.
71. Case 6/64, Rec. X, 1141.
72. Rec. XV, p.405.
73. Art. 50, Regulation No. 3.
74. Cf. Art. 3(1), 6(3), 24(2), 36(3), Regulation No. 3.
75. Cf. e.g. Cases 100/63 (Van der Veen); 24/64 (Dingemans); 61/65 (Vaassen-Gobbels); 4/66 (Hagenbeek); 14/67 (Welchner); 19/68 (De Cicco).
76. Rec. X, p.1105.
77. Rec. X, p.1122.
78. Rec. X, p.1259.
79. Specific problems involving the relationship between the Regulation and bilateral treaties have arisen on a number of occasions (See Table 1). On a general level, the Court has confirmed (Case 28/68, Torrekens) that those bilateral agreements specifically preserved by Art. 6(2) and Annex D, Regulation No. 3, enjoy priority over the provisions of Regulation No. 3, and that their interpretation falls not to the Court of Justice, but to the national jurisdictions. More recently, in Case 82/72 (Walder), the Court has held, conversely, that Regulation No. 3 overrides prior bilateral agreements unless these are specifically excepted by the Regulation, where the terms of the bilateral agreement were more favourable to the migrant than the terms of the Regulation. It is somewhat questionable whether this can be reconciled with the principle laid down in the Article 27,28 cases (below pp. 63-92), namely that the provisions of Regulation No. 3 are valid only to the extent that they do not operate to the detriment of the migrants affected.
80. The only decision worthy of mention in this area is the reassertion in the Van der Vecht case (19/67) that interpretations given by the Commission administrative are in no way binding on the national courts.

81. Cf. Commission Administrative, Deuxième Rapport, pp. 19-20, Quatrième Rapport, pp. 23-24.
82. Rec. X, p.347.
83. Rec. XI, p.131.
84. Rec. XI, p.1191.
85. Rec. XI, p.1199.
86. Rec. XV, p.405.
87. Rec. XV, p.443.
88. Rec. X, p.347.
89. Rec. XIV, p.689.
90. Rec. XVII, p.357.
91. Rec. XIV, p.700.
92. Rec. XVII, p.865.
93. Cf. Cases 100/63 (Van der Veen) concerning the Dutch AWW; 24/64 (Dingemans) on the Dutch IWI; 28/68 (Torrekens) on the French AVTS.
94. Cf. Cases 75/63 (Unger); 61/65 (Vaassen-Göbbels).
95. Rec. XII, p.377.
96. Lyon-Caen (1969), p.342.
97. Rec. XVII, p.445.
98. Rec. XVIII, p.457.
99. Rec. XVIII, p.463.
100. Rec. XVIII, p.466.
101. It may be questioned whether this is really the best way of co-ordinating legislations of this type. It is evident from the Court's judgment that it saw itself as "making do" in the absence of any satisfactory Community regulation of the problem (Rec. XVIII, p.467.) "que si ces difficultés ne peuvent être résolues dans leur ensemble que dans le cadre d'une intervention législative de la Communauté, cette circonstance ne saurait cependant porter préjudice au droit et au devoir des juridictions d'assurer la protection des travailleurs migrants dans tous les cas où celle-ci s'avère possible dans le respect des principes de la législation sociale de la Communauté et sans que soit bouleversé, pour autant, le système des législations nationales en cause".
102. Rec. XVIII, pp. 466-467. For a similar insistence on this principle in a related sphere, see Case 2/74 (Reyners v. Belgian State), Rept. XX, p.631. And cf. also Case 9/74 (Casagrande v. München) Rept. XX, p.773.



103. Rec. XIX, 1213.
104. For an interesting case in a related sphere (R.16/2/68), see the Court's treatment of nationality restrictions in the case of Ughola (15/69). Rec. XV, p.363.
105. Rec. XII, p.377.
106. For another vindication of this principle which carried the Court beyond the text of the regulation, see Case 3/70 (Di Bella) on family benefits. For other cases involving residence restrictions, see cases 75/63 (Unger), 33/65 (Dekker) and of course 51/73 (Smieja) described above (pp. 59-60).
107. The text of Art. 27, 28 is reproduced in the appendix to this chapter. For the list of cases involved, see Table 1.
108. Above, pp. 109 ff. and cf. the Conclusions of Lagrange A.G. in case 100/63 (Van der Veen), Rec. X, p.1105.
109. AWW, 1959.
110. DWI, 1961.
111. As amended by Art. 7 of Regulation 130.
112. And cf. Case 28/68 (Torrekens) where the Court held that Regulation No. 3 applied also to the French AVTS.
113. Rec. XII, p.617.
114. Séché (1968), p.502.
115. Above, p.104.
116. This pension is at a flat rate.
117. Which is not, of course, so in the case of the Dutch survivor's pension.
118. Rec. X, p.1105.
119. Rec. X, p.1128.
120. The Van der Veen decision in fact involved ten different cases. For the Centrale Raad's interpretation of the Court's judgment, see especially its decision of 7.10.64 in the case of Raad van Arbeid te Arnhem v.W-W: Jupiter P-B 14.
121. Decision of 15.2.66 (Steenbergen): Jupiter P-B 26; and cf. the RB Zwolle's decision of the same day in Wind-Hoechma: Jupiter P-B 28.
122. Rec. XII, p.626.
123. Rec. XIII, p.235. This case involved a man (Giechelski) who had paid contributions in FR Germany for only 21 terms (and where, consequently, aggregation was necessary to give him a right to a pension) and in

France for 113 terms (and where, consequently, no aggregation was necessary). As French pensions are calculated on the basis of a maximum period of 120 terms, the French pension to which Ciechelski would have been entitled in the absence of proratisation was 113/120 of the maximum; if Art. 28 were applied, he would have received only 113/134 of the same maximum. Consequently, Ciechelski argued that Art. 27 and 28, Regulation No. 3 should be applied to give him a German pension, but not to reduce his French pension. The Court upheld his argument.

124. Rec. XIII, p.244. My emphasis.
125. See above, pp. 132 ff.
126. Voirin (1968); for another discussion of the effects of the Court's decision, see Huij (1969).
127. These provisions are reproduced in the appendix to this chapter. Voirin's argument (at p.334) that the decision is also contrary to Art. 11(1), Regulation No. 3 (which forbids the accumulation of two benefits relating to the same period) is less convincing, for it rests on the view that a pension which does not depend on the length of insurance (such as the Dutch widows' pension) is nevertheless granted in return for the whole professional career of the person concerned, so that any other pension relating to the same career will necessarily constitute an unjustified accumulation within the meaning of Article 11 (1) Regulation No. 3.
128. Voirin (1968), p.337.
129. Voirin (1968), p.334.
130. In so far as the Court does argue from the text, what it sees in the text is often far from obvious. Thus, one "attendu" in Ciechelski (Case 1/67) reads:  
"Attendu qu'il résulte de son libellé même que l'article 51 vise avant tout, le cas où la législation d'un Etat membre, à elle seule, n'ouvrirait pas à l'assuré un droit à prestations, en raison du nombre insuffisant de périodes accomplies sous cette législation".  
Rec. XIII, p.244 (My emphasis). One legal representative commission has aptly spoken of the "curious legal reasoning" of the Court in some of these cases.
131. See n. 119 above.
132. Rec. XIII, p.413.
133. Rec. XIII, p.487.
134. Rec. XIII, p.502.
135. Rec. XIII, p.551.
136. Rec. XIII, p.563.
137. Rec. XVII, pp. 871, 885, 893 respectively.
138. Rec. XVII, p.880.



139. Rec. XVII, p.891. The relevant "attendu" reads:  
"que si une telle façon de procéder devait conduire, dans certains cas, à avantager un travailleur migrant par rapport aux ressortissants du pays dans lequel il travaille, cette conséquence découlerait, non de l'interprétation du droit communautaire, mais du système actuellement en vigueur qui, faute d'un régime commun de sécurité sociale, repose sur une simple co-ordination de législations nationales non encore harmonisées;"
140. Rec. XVII, pp. 874-5.
141. Rec. XX, 571.
142. Cf. Rec. XX, p.581.
143. Although the Court did have to repeat its position again in a case relating to invalidity pensions, Case 140/73 (Mancuso), Rec. XIX, p.1449.
144. It is also possible that the measures taken by the Dutch government to counter the effect of the Court's decisions (Cf. Exposé Social 1968, p.185) may be the source of further litigation, as it is doubtful whether they are entirely compatible with the Court's decisions.
145. Lyon-Caen (1969), p.347.
146. Above, pp. 142-144.
147. Voirin (1968).
148. Lyon-Caen (1969), p.347.
149. Cf. Cases 19/67 (Van der Vecht); 35/70 (Manpower); 73/72 (Bentzinger); and the particularly complicated case 13/73 (Hakenberg).
150. Cf. e.g. Case 14/67 (Welchner), Case 82/72 (Walder).
151. This can perhaps be seen in the Court's slight modification in Case 12/67 (Guissart) of the principles announced in the Ciechelski case (1/67). (See p.88 above). One of the legal advisers to the Commission doubted, in an interview, whether the Court was always aware of the "emmerdement" which resulted from some of its decisions.
152. The main intention of this section is to look at the judicial application of Regulation No. 3 by the national courts and its relation to the interpretation of that Regulation by the European Court of Justice. Since our concern here is therefore not the ongoing development of the Regulation but rather the mechanics of its application, it has not been found necessary to extend the study of the national decisions beyond the time at which this section was first written (Summer, 1971).
153. See Table 2 in the Appendix to this chapter. It is difficult to establish a full list of national decisions with any confidence. The sources from which these decisions have been gleaned are indicated at the foot of Table 2.

154. See above, pp. 168 ff.
155. Decision of 22.1.1963. This case is listed as No. 8 in the list of Dutch cases in Table 2.
156. Decision of 24.1.1963. No. 9 in the Netherlands list (NL9).
157. 26.6.1963. No. 11 in the Netherlands list (NL11).
158. Decisions of 29.4.1964 (Dingemans): NL 12b, and 30.10.1963, NL 13a.
159. Decision of 8.10.1963: No. 2a in the list of French cases (F2a).
160. The question sent to the Court of Justice was finally posed by the Cour de cassation in its judgment of 24.10.1968: F2c.
161. 4.3.1964 (F3).
162. Cf. Case 11/67 (Colditz).
163. The same conclusion was reached in Luxembourg by the Conseil Arbitral des assurances sociales: 19.4.1962. No. 2 on the list of Luxembourg cases (L2).
164. 24.1.63 (NL 9).
165. 22.1.63 (NL8).
166. Cf. the Centrale Raad's decisions of 7.10.64 (Van der Veen) (NL 13b (i)); 7.10.64 (W-W) (NL 13b (ii)); 1.4.65 (NL 13b (iii)).
167. NL 29a and 30a.
168. Centrale Raad, two decisions of 5.10.66 (NL 29b, 30b).
169. The Centrale Raad's approach was followed in a later decision by RB Roermond, 21.2.67 (NL 37a).
170. Thus, all the 1967 cases concerning Art. 27, 28, Regulation No. 3, were referred to the Court of Justice by courts from other member states.
171. The same period between the judgments in Van der Veen (Case 100/63) and Ciechelski (Case 1/67) also saw other problems concerning Articles 27 and 28, Regulation No. 3, in the national courts, which might be mentioned, although they are not relevant to the main point at issue. These include the Hagenbeck case (4/66; cf. NL 24 in Table 2) and the Cossutta case (18/67; cf. case no. 8 in the list of Belgian cases in Table 2 (B8)) and a dispute in Germany between two chambers of the Bundessozialgericht which was resolved only by the Court's decision in Case 14/67 (Welchner) (Cf. cases No. 5 and No. 7 in the list of German cases in Table 2 (G5, G7)).
172. NL 35a, 35b; and cf. the decisions of the same courts listed in Table 2 as NL 37a and 37b.



173. Centrale Raad van Beroep, 18.6.1968 (NL 40).
174. Above, p.136.
175. F.15b.
176. 26.2.70 (B15).
177. This did not however prevent their being questioned in the Gross (26/71), Keller (27/71), Höhn (28/71) and Niemann (190/73) cases. See above, pp. 173 ff.
178. Cf. Bundessozialgericht 25.8.60 (G2); Tribunal de grande instance de Strasbourg 4.10.63 (F1a); RB Amsterdam 24.11.62 (NL 5a).
179. Kontonrechter, Delft, 12.11.64 (NL 22).
180. Cf. Arrondissementsrechtbank Maastricht (28.5.64 (NL 18a)); Arrondissementsrechtbank Assen, 23.7.64 (NL 19a).
181. 1.6.65 (F1b).
182. 26.9.68, the only case on the Italian list in Table 2 (I1).
183. 11.7.67 (F11a). This was the first stage of the Duffy case. The part of the decision referred to here was overruled on appeal by the Cour d'appel de Paris.
184. Commission de première instance du contentieux du Haut-Rhin, 8.3.67 (F9a).
185. 16.11.67 (F9b).
186. F9c.
187. 20.5.69 (L5a).
188. G11a.
189. 23.4.68 (G9).
190. Cf. G5, G7a.
191. See above, pp. 142 ff.
192. R. B. Roermond, 1.4.62 (NL1a); Centrale Raad van Beroep 19.11.63 (NL1b); R.B. Amsterdam, 19.3.63 (NL10a).
193. 16.10.63 (NL 10b)
194. 7.4.64 (NL 16a).
195. This was the Van der Vecht case (NL 36a).
196. Cf. Centrale Raad van Beroep, 20.10.65 (NL 16b); R. B. Groningen, 3.8.64 (NL 20); Hoge Raad, 22.12.65 (NL 28).
197. See Table 2.

198. In the Caisse d'Entraide case (27/69), this court was apparently sitting as an appeal court.
199. Decisions of 19.7.67 (NL 37b); 5.10.66 (Steenbergen) (NL 29b); 5.10.66 (Wind-Hoechma) (NL 30b); 4.10.67 (NL 35b) (all on Articles 27, 28 of Regulation No. 3); 19.11.63 (NL 1b) (on Art. 12); 27.10.62 (NL 3) (on Art. 43).
200. Bundessozialgericht, 28.8.64 (G5).
201. Hoge Raad, 15.4.64 (NL 17); Hoge Raad 22.12.65 (NL 28); Bundessozialgericht, 5.8.60 (G2); Cour de cassation, 16.2.65 (F4).
202. The first six social security references to the Court of Justice came from Dutch courts, four of them from the Centrale Raad van Beroep. But after the Court had given its decision in the Ciechelski case (1/67), no Dutch tribunal sent a social security case to it for five years (until Case 78/72 (De Waal)).
203. Cf. e.g. Holloway (1971).
204. Above, p.165.
205. Decision of 13.11.70 (F20).
206. 15.11.67 (F12). It is interesting to note too the attitude of the Advocate General, Dutheillet de Lamothe, who is tempted to repeat to a national court which questions the decision of the Court of Justice the proverb: "le curé perd son temps à dire deux fois la messe pour les sourds". Above, p.174.
207. Cf. especially Köln (1965).
208. Cf. e.g. Green (1969); Campbell (1969); Degan (1966).
209. Cf. Monaco (1965), pp. 178-9; Bisdorf ((1965), p.188.
210. Cf. e.g. Colin (1966).
211. Cf. e.g. Green (1969); Schlochauer (1966).
212. For further discussion of the problem, see Holloway (1971).
213. Cf. Art. 166 EEC.
214. Cf. e.g. Cases 82/72 (Walder); 51/73 (Smieja); 130/73 (Vandeweghe)
215. Cf. Regs. 73/63; 36/63; 47/67; see p. 119 and notes 29-31 above.
216. Huij (1968) aptly speaks (p.548) of the "dislocation" ("ontwrichten") of the system of aggregation and proratisation by the decisions of the Court.
217. Not published until J.O.C.E. no. 194 of 28.10.66, p.3333.
218. J.O.C.E. No. 64, 5.4.67, p.1009.
219. Parlement Européen, Documents de séance, 1967-68, no. 158.



- 220. J.O.C.E., 14.2.68.
- 221. J.O.C.E., No. C95, 21.9.68, p.18.
- 222. The Parliament's opinion was published in J.O.C.E. No. C135, 14.12.68, p.4. It was based on a report by M. Servais (Documents de Séance, 1968-69, No. 158). The opinion of the ESC was published in J.O.C.E. No. C21, 20.2.69, p.18.
- 223. OJ, No. L74, 27.3.72.
- 224. We shall return to the difficulties of negotiation in Chapters 6 and 7.
- 225. For an account, see Séché (1968-69).
- 226. For a more exhaustive description of the new regulation, see Tantaroudas (1972).
- 227. For a discussion of this problem see Troclet's report to the Parliament: Documents de séance, 1967-68, No. 158, at pp. 78-80.
- 228. pp. 81-84.
- 229. But note that nationality discriminations contained in collective agreements are forbidden by Article 7, Regulation 1612/68.
- 230. Article 1(a), Annex II.
- 231. Above, p.161.
- 232. The Court of Justice has already had occasion to interpret Article 10 in the Smieja case (51/73). Art. 10 (1) Regulation 1408/71 was taken as having the same meaning as Art. 10 (1), Regulation No. 3. See p.157 above.
- 233. Article 60 of the proposed regulation.
- 234. Article 73, Regulation 1408/71.
- 235. Art. 98, R. 1408/71. In fact no such uniform solution has yet been agreed on. The question continues (December 1974) to cause difficulty and it is not clear whether a uniform solution would mean universal payment of the country of employment or by the country of residence.
- 236. Cf. Voirin (1968).
- 237. It is thought that the Commission also take the view that Article 46(3) of the new regulation is incompatible with the case law of the Court of Justice.
- 238. These cases are discussed above, pp. 141 ff.
- 239. Tantaroudas (1972), p.55.

- 240. Article 7 of the proposed regulation. Cf. the Troclet report, Document de seance, 1967-68, No. 158.
- 241. Cf. Art. 7, Regulation No. 3 and Art. 8, Regulation No. 1408/71.
- 242. In September 1974, the first meeting of the new Committee was still at the stage of preparation.
- 243. See pp. 155 ff. above and No. 94.



CHAPTER 6

1. Ribas and Voirin (1969), p.855.
2. Cf. Dr. Hillery's speech at the European Colloquy on the problem of Migration, Catholic University of Louvain, 31.1.74.
3. Cf. e.g. Maestripieri (1972). This is an example of a concept which is admirably suited for legal exposition, but which nevertheless presents a distorted image of social reality.
4. See pp. 58 ff. below.
5. Castles and Kosack (1973), p.15.
6. Castles and Kosack (1972), p.16. Most of the facts and figures on migration before the Second World War are taken from this source.
7. Castles and Kosack (1973, p.17.
8. Castles and Kosack (1973), p.18.
9. Pic (1905), pp. 275-276. Note that this figure does not include frontier workers, nor the large number of foreigners naturalised under the nationality laws of 1889 and 1893.
10. Castles and Kosack (1973), p.19.
11. Pic (1905), p.277, n.1.
12. Cf. Pic (1905), p.277; Castles and Kosack (1973), pp. 17,19,21.
13. Cf. Kindleberger (1967), p.179; Castles and Kosack (1973), pp. 22-23.
14. Cf. Castles and Kosack (1973), pp. 23-25.
15. The Times, 15.6.1974.
16. Cf. Castles and Kosack (1973), pp. 596, 32-35.
17. Wissenschaftlicher Beirat (1974), p.568.
18. Although the percentage of migrants in the work-force in Luxembourg is much higher than in the other member states, the number involved and the political weight of the various countries are such that it is necessary to pay particular attention to developments in France and F.R. Germany.
19. Since one can only speak of a shortage of labour when employers have difficulty in finding workers for jobs they have created or wish to create.
20. But the importance of demographic trends should not be over-emphasised, labour shortages are caused not by a low natural supply of labour, but by the fact that demand for labour exceeds the supply, whatever its rate of natural increase.
21. Cf. Castles and Kosack (1973), p.27.
22. Hunter and Reid (1970), p.2.

23. Kindleberger (1967), p.182.
24. Kindleberger (1967), p.200.
25. Cf. Geiselberger (1972), p.30.
26. Cf. Kindleberger (1967), p.182.
27. Cf. Wissenschaftlicher Beirat (1974), p.572: This report comes to the conclusion that if the supply of foreign workers is restricted, it will not be impossible to fill the most repugnant jobs: it will simply be necessary to pay the workers more and give them better equipment.
28. Cf. Geiselberger (1972), pp. 30-31.
29. Geiselberger (1972), pp. 29-30.
30. As M. Rigaux has put it: "The fact that they have no share in the political life of the place where they reside, and that an administrative measure can arbitrarily terminate their sojourn, subjects them without defence to the dominant economic interest of the host country". Rigaux (1974), p.4.
31. This is the case in France, for example, where foreigners are not allowed to become trade union officials. See below, p.234.
32. The risk in Britain forms an exception to this rule.
33. The immaculate strike record of a country like Switzerland must no doubt be seen as a result not only of the good behaviour of the Swiss, but also of the good behaviour of the Italians, Spanish etc. working under such legal restrictions.
34. Cf. Nikolinakos (1973), pp. 63 ff.
35. Aron (1974), pp. 9-10.
36. According to the U.N. "Economic Survey of Europe": "Since migrants tend to be concentrated in unskilled jobs, which are more heavily hit by unemployment, the proportion losing their jobs is far higher than among nationals. Thus a large part of the social cost of supporting unemployment can be transferred to the countries of origin of immigrants". U.N. E.C.E., Economic Survey of Europe, 1967, Ch. 1, p.49; quoted by Castles and Kosack (1973), p.410-411.
37. Nikolinakos (1973), p.38.
38. Nikolinakos (1973), p.66.
39. Geiselberger (1973), p.23.
40. Cf. e.g. Kindleberger (1967), p.202 "In the early stages of the Lewis model, high profits permit the country to focus on productive capital. Because the foreign workers will accept low levels of accommodation ... investment in social-overhead capital can be kept relatively low ... Men crowd into barracks and slums in the short run, as they did in the Industrial Revolution in Britain and in the period of heavy migration in the United States".



41. Cf. Bohning (1972), ch. 4.
42. Cf. Geiselberger (1973), pp. 31-37.
43. Cf. Gorz (1970).
44. Extreme manifestations of this can be seen in the anti-Algerian riots in France, the hostility between migrant and German workers shown during the Ford's strike in Germany in 1973, the Schwarzenbach movement in Switzerland.
45. For a review of the discussion, see Castles and Kosack (1973), pp. 384 ff.
46. Kindleberger (1967), p.3.
47. Quoted in the Times, 15.6.1974.
48. Spaak (1956), p.88.
49. Castles and Kosack (1973), pp. 28-29.
50. Though of course this is not always the case. One need only think of movements from the G.D.R. before 1961, or of more recent movements from Portugal, Greece or Spain.
51. Cf. Geiselberger (1973), p.18.
52. Cf. Castles and Kosack (1973), pp. 426-427.
53. Table 6 shows the importance of these receipts for Italy, Greece and Spain.
54. Cf. Gorz (1970), p.39.
55. Cf. Cinanni (1969); Blumer (1970), pp. 207-208; Geiselberger (1973), pp. 37-38; Castles and Kosack p.427; Nikolinakos (1973), p.136.
56. Cf. e.g. the headline on the front page of Die Zeit, 15/73, 6th April 1973: "Nigger, Kulis oder Mitbürger? Unser Sozialproblem Nr. 1: die Gastarbeiter".
57. Cf. e.g. Dr. Hillery's speech at Louvain: 31.1.74. The term is unhelpful from an analytical point of view, but does convey the particularly bad conditions under which migrants work.
58. Cf. e.g. Theo Sommer in the article under the heading quoted in n.56, where he speaks of the danger "dass wir aus Selbstsucht inmitten des zwanzigsten Jahrhunderts ausländische Arbeiter als Konjunkturkulis in Zuständen des frühkapitalistischen neunzehnten Jahrhunderts gefangen halten". M. Bencheikh, Counsellor at the Algerian Embassy in Brussels, has made an even more severe comparison: "The whole European attitude towards immigration from non-member countries has been to obtain the maximum economic advantage from it at minimum cost. The immigrant worker thus appears as a latter-day slave, at the will and mercy of his masters, having more duties than rights in a society to whose prosperity he contributes but which both in practice and in law places him in a social, moral and intellectual ghetto, thus creating a breeding ground for racialism and systematic violence". Bencheikh (1974), p.6.

59. Cf. Geiselberger (1973), pp. 75-78; Castles and Kosack (1973), pp. 79-87.
60. Cf. Geiselberger (1973), pp. 73-74.
61. The industrial accident rate for migrant workers in FR Germany is  $2\frac{1}{2}$  times higher than that for German workers. Cf. Geiselberger (1973), pp. 74-75.
62. Generally, on this topic see Geiselberger (1973), ch. 3; Castles and Kosack (1973), ch. 3.
63. Perhaps, however, it might be salutary to quote from the Times' description (15.6.1974) of a typical hostel for migrant workers in Paris: "Take 45 rue Gabriel Peri, Ivry-sur-Seine, a disused factory:  
541 Africans:  
Average Room Size: 17x12.80x2.57 metres.  
Average vertical space between beds: 1.17 metres.  
Average horizontal space between beds: 0.65 metres.
- Ground floor  
1st room: 13 beds  
2nd room: 10 beds
- First floor (without windows): 70 beds
- Second floor  
1st room: 93 beds, 17 campbeds.  
2nd room: 58 beds, 3 campbeds.  
3rd room (without windows): 40 beds, 3 campbeds.  
4th room: 19 beds  
5th room: 3 beds.
- Third floor  
1st room: 100 beds, 4 campbeds  
2nd room: 60 beds, 4 campbeds.  
3rd room (without windows): 22 beds.
- Water: On second and third floors one tap of non-drinkable water  
Drinking water: Two taps in kitchen on ground floor  
Toilets: Five WCs on ground floor, and one on second and third floors.
- Bed clothes: One sheet, 1.50 metres long per person; cleaned once every 40 days. Blankets provided; not cleaned once in four years.
- Price: (i) Entrance fee £14.  
(ii) Price of bed per month £4.
- Revenue per month: 54 x 4 = £2,164.
64. But that was several years ago: cf. Castles and Kosack (1973), p.410.
65. Cf. Castles and Kosack (1973), p.413.
66. Cf. Geiselberger (1973), p.185; Castles and Kosack (1973), p.413.
67. Hence the tendency for countries of emigration to become simultaneously countries of immigration: thus, growing numbers of Africans are now being employed in Greece and Spain: Nikolinakos (1973), pp. 147-151; Geiselberger (1973), p.185).



68. See above, p.28 (n.49).
69. Cf. Castles and Kosack (1973), pp. 416-420.
70. Kayser (1971), p.150.
71. Castles and Kosack (1973), p.420.
72. Pic (1906), pp. 307, 309 ff.
73. Castles and Kosack (1973), p.45.
74. Castles and Kosack (1973), p.19.
75. Castles and Kosack (1973), p.22.
76. Castles and Kosack (1973), pp. 34 ff.
77. Cf. Geiselberger (1973), pp. 39-45; Castles and Kosack (1973), pp. 40-41.
78. Geiselberger (1973), p.41. The fee was increased to 300 DM from the beginning of 1972.
79. 44% of newly entering migrants came through the official recruiting system in 1969: Castles and Kosack (1973), p.42.
80. Cf. Castles and Kosack (1973), p.106.
81. Cf. Castles and Kosack (1973), p.104.
82. Cf. Geiselberger (1973), pp. 51-53; Castles and Kosack (1973), pp. 101-102.
83. Cf. Castles and Kosack (1973), p.101.
84. Geiselberger (1973), p.54.
85. Cf. Geiselberger (1973), pp. 55-58; Castles and Kosack (1973), p.126.
86. Cf. Castles and Kosack (1973), p.126.
87. Cf. Castles and Kosack (1973), p.126.
88. Cf. e.g. Wissenschaftlicher Beirat (1974), p.572.
89. Delannoo (1969), p.982.
90. Delannoo (1969), p.983.
91. This is a very rough estimate. It is difficult to get any precise idea of the costs which result from a social security agreement, especially as the figures which are available distinguish only between payments abroad and payments at home and not according to the nationality of the recipient. According to figures given by

Geiselberger (see Table 7), and borne out by Salowsky's figures, in so far as they overlap (see Tables 8 and 9), the net export from Germany of pensions, sickness benefits and industrial injury benefits amounted to almost 186 million DM for the year 1969. Of this total, however, a remarkably small proportion went to the countries in which migrants are recruited. Although these countries accounted for 1.5 million of the 1.8 million foreigners, then working in Germany, of the gross 196.5 million DM paid out in pensions, only 27.5 million DM went to the recruitment countries; of the remainder, a large proportion probably went to Germans living abroad in retirement. This is easily explained by the fact that very few of the migrants recruited since the war will yet have reached retirement age. The main cost to the pension funds of the social security agreements is yet to come. Far more significant for the moment is the payment of family benefits. In 1970, 380 million DM were paid abroad to children of foreigners working in Germany; of this, 370.5 million DM went to the recruitment countries (Geiselberger (1973), p.109). If one allows for inflation, for the improvement of social security agreements (and the replacement of Regulation No. 3 by Regulation No. 1408/71), for the aging of the workers and for the substantial growth in the number of migrant workers (from 1½ million in 1969 to about 2½ million by the end of 1973), then the estimate of 1,000 million DM as the annual expenditure must be a very conservative one indeed. For details of the payment of pensions, see Tables 7, 8 and 9.

92. Although this is not true of Algeria's position in the current negotiations on Association with the EEC. Cf. Agence Europe 24.5-9-73.
93. Kindleberger relates that: "When Belgium signed an agreement with Turkey over immigration, it hoped to be able to avoid providing social-security benefits at the same level as to Belgian citizens. Turkey had been able to obtain the local level from other countries, however ... and Belgium had to fall in line". Kindleberger (1967), pp. 181-2.
94. In 1970, the contributions (employees' and employers') paid for the insurance against sickness and old age of foreign workers in FR Germany amounted to 5,000 million DM, i.e. the contributions paid to these funds exceeded the benefits paid by them to foreign workers in that year by a sum probably well over 4,500 million DM. (Geiselberger (1973), p.104). The fact that foreign workers contribute so much to social insurance schemes does not, of course, modify in any way the cost of giving those workers wider protection through bilateral social security agreements. Although the size of their contribution strengthens the argument for the conclusion of social security agreements, it should be noted that very large groups of workers may nevertheless be left without protection for some time. This is shown for the Yugoslavs, for example, by tables 7 and 8. Although there were in 1969 already 388,953 Yugoslavs working in Germany (the largest group of foreign workers) and contributing to the social insurance funds, the payments made from those funds to Yugoslavia in that year amounted to only 24,990DM, and this sum apparently (Table 8) went to only ten people, who had presumably worked for so long in Germany that they were entitled to a pension even in the absence of a treaty. The social security agreement with Yugoslavia was not concluded until 1970.



95. Cf. Agence Europe 20.9.73; 7.2.74.
96. Hanotian (1973), p.44.
97. Cf. Troclet (1962), pp. 136-149; Pic (1905-1906); Raynaud (1905).
98. Cf. Pic. (1906), p.302, n. 2; Raynaud (1905), p.579, n. 1.
99. Cf. Hanotian (1973), p.65, nn. 3, 5, 8.
100. Doublet (1955).
101. Doublet (1955), p.269.
102. Admittedly, Doublet wrote this article in 1955, when the importance of post-war migrations had not yet become clear.
103. Delannoo (1969), p.982.
104. This is borne out by the figures in table 7.
105. As Yannopoulos puts it: "These measures (to free movement) can be justified for their contribution both to an improved spatial allocation of resources and to the strengthening of growth propagation". Yannopoulos (1969), p.226. Cf. also Balassa (1962), Ch. 4.
106. p.27.
107. Spaak (1956), p.17.
108. Spaak (1957), p.89.
109. Cf. Dahlberg (1968), p.311: "One of Italy's most pressing economic problems was that of high unemployment, while at the same time Germany had a shortage of all types of labour. It was thus logical for Italy to seek jobs for its unemployed through strong provisions to free the movement of labour and for Germany to view such demands sympathetically". The logic of this is questionable.
110. All too often (see, for example, the quotation from Dahlberg in the previous note, or the critique of Cinanni (1969) at pp. 93 ff) the Community system of free movement is presented simply as a system designed to promote the migration of labour. It should be clear from the analysis that follows that this neglects the most important innovation - the abandonment of the member states of the right to control the entry of Community nationals and to discriminate against them.
111. Ohlin (1955), p.120.
112. Ohlin (1955), p.121.
113. Dahlberg (1968), p.311: see notes 109,110, above.
114. Note that Articles 48 and 49 were actually implemented only after tough negotiations, concessions to Italy in this sphere often being related to concessions from Italy in other spheres. For an account, see Dahlberg (1968).

115. Dahlberg (1968), p.311.
116. Swann (1973), p.69.
117. Beever (1969), p.26.
118. Yannopoulos (1969), p.234.
119. Cf. e.g. Grabitz (1970); Sinagra (1966); Smuraglia (1968), p.33.
120. The ideological importance of free movement for ardent supporters of European integration is neatly captured by Delpérée.  
"Pendant plusieurs années, la libre circulation des travailleurs migrants fut la tarte à la crème des Européens" Delpérée (1967), p.1558.
121. Konrad (1969), p.6; Cf. Braillon (1959), p.134; Doublet (1955), p.273.
122. Commission Administrative, Premier Rapport Annuel, pp. 9-11.
123. Commission Administrative, Premier Rapport, p.10.
124. Commission Administrative, Premier Rapport, p.10.
125. Cf. Doublet (1957), pp. 583-584.
126. Cf. Bellagamba (1963), p.25: After describing the conclusion of the Convention: "Essa necessitava per entrare in vigore della normale procedura di ratifica da parte dei Parlamenti dei sei paesi: questo fatto avrebbe comportato una sensibile perdita di tempo e avrebbe potuto forse comprometterne l'attuazione per l'eventuale sovrapporsi di ostacoli e dinieghi da parte degli stessi organi legislativi. Allora, per ovviare a tali inconvenienti, ... si ritenne opportuno da parte del Consiglio dei Ministri della Comunità Economica Europea, di recepire la Convenzione stessa e renderla esecutiva attraverso un proprio provvedimento". This is confirmed by Van Nijntanten (1962), p.182. Hardly the most democratic birth for a regulation.
127. Cf. Kahn-Freund (1960), p.321: "It is no exaggeration to say that the Regulations (Regulation No. 3 and Regulation No. 4) ... are, at the time of writing (autumn 1959), not only the most important step taken by the Community in the fields of labour law and social security, but by far its most significant achievement in legislation altogether".
128. Some of the tables published in annex to the latest report of the Commission Administrative (for the year 1969) are reproduced as Tables 10, 11, 12, 13, 14, 15, 16 at the end of this chapter. These tables make clear the extent to which the regulations effect a one-way transfer of money to Italy. Thus, in 1969:
  - 5,415 million FB were transferred as pensions from one member state to another; of this sum 1,916 million FB went to Italy; to the total amount, Italy contributed only 322 million FB (Table 13).



- 1,415 million FB were paid as family benefits for children living in another member state; of this sum, 905 million FB were paid for children living in Italy; Italy's contribution to the total sum was so insignificant that the Commission did not consider it necessary to quantify it (Table 14).
- Medical treatment to the value of 1,154 million FB was given to members of families of migrant workers residing outside the debtor country; of this sum, treatment to the value of 932.5 million FB was given to family members residing in Italy; to the total amount, Italy contributed only 24 million FB (Table 10).

These figures do not give an accurate picture of the extent to which Italy and Italian migrants benefit from the regulations, partly because some of the statistics are defective, but, more important, because they do not indicate the importance of benefits to pensioners and children residing in the debtor country. It is likely that, if these figures were available, our picture of a one-sided transfer of money to Italians would be reinforced.

- 129. Motta (1967), p.306.
- 130. See p.239 above.
- 131. Cf. e.g. Doublet (1955), p.273, Doublet (1957), p.574; Dupeyroux (1959); Dedien (1959), pp. 93, 94; Ribas (1971), p.30.
- 132. Doublet (1957).
- 133. Doublet (1957), p.584.
- 134. In 1969, over 8,262 million FB were transferred from one member state to another under the regulations. See tables 10-16.
- 135. Cf. e.g. Ribas (1971), p.30.
- 136. Cf. Yannopoulos (1969), p.237.
- 137. Cf. Falchi (1971), p.19; for a picture of the development of intra-Community migration in relation to total migration, see Table 17 at the end of this chapter.
- 138. For figures, see Konrad (1969), p.155 and Commission (1971), p.107.
- 139. Cf. Commission (1973), Exposé Social, Annex D.V. 2(p.240).
- 140. Cf. Commission (1971), p.108; (1973) Exposé Social, Annex D.I.3b (p.232).
- 141. For a full account, see Böhning (1972), ch. 2.
- 142. Cf. Dahlberg (1968), p.324 and passim.
- 143. Falchi's title is given as "Ministre plenipotentiaire, Ministère des Affaires étrangères (Rome)". Presumably the views which he expresses can be taken as reflecting the official Italian position.
- 144. Falchi (1971), p.17.

145. Falchi (1971), p.23.
146. Cf. Dahlberg (1968); Geiselberger (1973), p.47 reproduces a passage from the report of the principal German employers' organisation, the Bundesverband der Deutschen Industrie, for 1962-63: "Wir haben uns im Berichtsjahr gemeinsam mit der Bundesvereinigung der Deutschen Arbeitgeberverbände gegen alle Bestrebungen der EWG gewandt, gleichzeitig mit der schrittweisen Verwirklichung der Freizügigkeit innerhalb des Gemeinsamen Marktes den Zugang von Arbeitnehmern aus Drittländern zu erschweren" (BDI - Jahresbericht 1962/63, S.69).
147. Cf. Bonnet (1969), p.169; Heynig (1969), p.69.
148. Cf. Geiselberger (1973), p.48; Falchi (1971), p.21; Cinanni (1964), p.101; Offeddu (1967), p.9; Castellani (1967), p.18.
149. Cf. Falchi (1971). The two Italian demands have met with sympathy in the Commission and form an important part of the Commission's current Social Action Programme on migrant workers. Opposition, particularly from the German government, remains strong, but it may be that the current economic downturn and the fall in demand for migrant labour will assist the Commission in the pursuit of its aims.
150. This view is by and large accepted by the Commission, as by some French and German commentators - cf. Jaumont (1973), p.76, Geiselberger (1973), pp. 48-49.
151. M. Coppe, in presenting the Social Report for 1972, expressed concern at the fact that, although there were 2,300,000 unemployed in the Community, there were at the same time almost 3,000,000 non-Community workers employed in the Community. (Geiselberger (1973), p.49).
152. Thus Geiselberger has some justification in asserting: "Aber auch für die italienischen Arbeiter brachte der Druck ihrer Regierung auf Herstellung der Freizügigkeit letzten Endes keinen echten Nutzen". Geiselberger (1973), p.49.
153. Böhning (1972), p.86. For a fuller discussion, see ch. 5 of that book.
154. Dahlberg (1968), p.326.
155. Hunter and Reid (1970), pp. 23-24.
156. Böhning (1972), p.86.
157. Cf. No. 39 above.
158. For a report, see "Der Spiegel", 36/73, pp. 19-26.
159. Cf. Böhning (1972), Ch. 4.
160. Cf. Wissenschaftlicher Beirat (1974); Merx (1972), p.233.



161. Cf. Wissenschaftlicher Beirat (1974), p.569.
162. For a discussion of this, see Nikolinakos (1973), pp. 142-152, Geiselberger (1973), pp. 187-192.
163. Cf. Castles and Kosack (1973), p.423.
164. Cf. Castles and Kosack (1973), p.35.
165. Cf. Stephen (1974), p.630.
166. Stephen (1974), p.630.
167. Wissenschaftlicher Beirat (1974).
168. Agence Europe 20.4.74.
169. Cf. Castles and Kosack (1973), p.423.
170. Castles and Kosack (1973), p.423.
171. Wissenschaftlicher Beirat (1974).
172. Wissenschaftlicher Beirat (1974), pp. 573-574: "Um Auslandsinvestitionen in die Herkunftsländer der ausländischen Arbeitskräfte zu verlagern und zusätzliche Direktinvestitionen in ihnen anzuregen, sollte die Bundesregierung darauf bestehen, dass dort Kontrollen und Niederlassungsbeschränkungen für ausländische Unternehmen beseitigt werden. Die Aufnahme von Arbeitskräften in der Bundesrepublik sollte ihre notwendigen Gegenstücke in der Niederlassungsfreiheit der Unternehmen, der Freiheit des Kapitalverkehrs und der Sicherung von Eigentumsrechten in den Herkunftsländern der ausländischer Arbeitskräfte haben ... In den Herkunftsländern entspräche ihnen (i.e. measures proposed in the FRG) eine Politik der gezielten Herbeiführung komparativer Vorteile für arbeitsintensive Produkte durch eine auf eine niedrige Bewertung der Währung hinauslaufende Kombination von Lohn-und Wechselkursgestaltung".
173. Wissenschaftlicher Beirat (1974), p.573, III, 5.
174. It is interesting to note that the views put forward by this Report agree in many respects with those expressed in a recent interview by D.W. von Menges, managing director (Vorstandsvorsitzender) of the Gutehoffnungshütte Aktienverein, the largest machine-building concern in the EEC (Spiegel 7/74, pp. 44 ff), as also with those expressed in the Zeit article by Theo Sommer to which we have already referred (Die Zeit, 15/74, p.1).
175. This is borne out by the analysis of the German economy by Altvater et al. (1974).
176. p. 25, above.

177. Perhaps this "trend" would be better described as a "tendency", which could well be upset by various factors, e.g. by the recent political instability in some of the Mediterranean countries. It is clear that the development suggested would not, in any case, mean an end to all large-scale labour migration. Cf. Nikolinakos (1973), pp. 142-150.
178. One can see some of these problems foreshadowed in the report of the Wissenschaftliche Beirat: these are the problems involved in the dependence of any country on foreign capital.
179. Cf. Merx (1972), p.238: "Auch von der Angebotsseite sind der weiteren Zunahme der Ausländerbeschäftigung auf absehbare Zeit kaum Grenzen gesetzt. Zum Beispiel waren allein in der Türkei 1971 mehr als eine Million Arbeitskräfte registriert, die in der Bundesrepublik arbeiten wollen".
180. Above, p.3.



## Chapter 7

1. Renner (1949).
2. Commission (1971 (5)).
3. Cf. Commission Administrative, 2<sup>ème</sup> Rapport, pp. 19-20; 4<sup>ème</sup> Rapport, pp. 23-24.
4. This is made clear by the hostile reaction with which some of the Court's decisions (e.g. on the aggregation and proratisation of pensions) have been greeted by the member states.
5. As was pointed out in the introduction, the capitalist mode of production requires a legal system that is relatively stable. In a sense, then, it is in the interests of the owners of capital that courts should not be particularly responsive to their short-term interests. Cf. Renner (1949), p.256: "The law aims at the control of the organic texture of nature, of the interconnections among man and matter. The whole of this intricate structure forms the substratum, the foundation of the law. And since this substratum is subject to change, the same applies to the law. But the imperceptible process of change does not immediately react upon the norms. At first it is scarcely noticeable to the individual, much less to the Community, and so the norm remains constant. The legal institution remains the same, as regards its normative content, but it no longer retains its former social functions".
6. See Chapter 5.
7. See Chapter 3, n. 128 and Tables 10-16.
8. It is significant that this restriction of the maximum period was contained neither in the Commission's original proposal nor (and this is more important) in the amendments proposed by the Administrative Commission, which discussed the proposed revision in great detail (Commission Administrative, 6<sup>ème</sup> et 7<sup>ème</sup> Rapports annuels, pp. 83-84). The limitation must, therefore, have been introduced by the Council and at the prompting of some-one other than the top advisers on social security matters, who had agreed to more generous provisions in the Administrative Commission. The members of the Administrative Commission usually also take part in the Council negotiations, but apparently act under stricter government instructions.
9. For a discussion of these proposals, see the Commission Administrative, 6<sup>ème</sup> et 7<sup>ème</sup> Rapports annuels, pp. 60-63.
10. Strictly speaking, it was not proposed that Community nationals living outside the Community should be covered by all the provisions of the regulation: that would be administratively impossible. It was proposed that they should benefit from the equality of treatment prescribed by Article 3, Regulation No. 1408/71. It is this which was rejected, both by the Administrative Commission and by the Council.

11. Social Action Programme (1973), Action II5 1(d).
12. Cf. Agence Europe, 22.2.74; 5.4.74; 17/18-6-74.
13. Cf. Agence Europe, 20.9.73; 7.2.74; 22.2.74.
14. The German report referred to in the last chapter specifically urged the Federal Government not to extend its commitment to the free movement of labour. Wissenschaftlicher Beirat (1974),  
p. 6.
15. Cf. Der Spiegel, 7.10.1974 (41/74), pp. 32-34.
16. One important influence on the development of the regulations which has not been considered either in this or in the last chapter is the internal evolution of the social security systems of the member states. This topic has been omitted because our interest has been focused, not on the absolute social security protection of migrants - a vast subject - but on the protection of migrants' relative to the protection of non-migrants. It should not be overlooked, however, that changes (reinforced by the entry of the three new member states) in the concepts and organisation, and particularly the gradual generalisation of social security schemes within the member states may eventually lead to a restructuring of the regulations and a modification of the mechanisms of co-ordination which would inevitably affect also the relative position of migrants. Given the diversity of the systems involved, however, it is likely that such a development, if it comes about at all, will take a long time.



Chapter 8

1. Kindleberger (1967), ch. 11.
2. This result bears an obvious affinity to the more general conclusion reached by Marx: "My inquiry led me to the conclusion that neither legal relations nor political forms could be comprehended whether by themselves or on the basis of a so-called general development of the human mind, but that on the contrary, they originate in the material conditions of life, the totality of which Hegel, following the example of English and French thinkers of the eighteenth century, embraces within the term "civil society"; that the anatomy of this civil society, however, has to be sought in political economy". Marx (1971), p.20.

### CHAPTER 3

#### TABLES



TABLE 1

## Wage Ratio in Capitalist Countries (per cent)

Country	Sector	1950-54	1955-9	1960-64	1964	1965	1966	1967	1968	1969	1970
U.K.	Corporate	68.5	70.2	71.7	71.4	72.1	74.7	73.8	74.8	76.9	78.4
	Manufacturing	64.9	67.6	69.2	69.1	70.1	72.7	70.8	72.2	75.2	76.6
U.S.	Corporate	71.0	71.7	71.4	70.2	69.1	69.4	70.4	70.5	71.7	73.3
	Manufacturing	69.2	70.7	71.5	70.2	68.8	69.3	70.8	70.8	72.2	
France	G.D.P.	49.5	52.5	53.2	54.7	54.9	54.5	54.4	55.0	54.8	
Germany	G.D.P.	52.0	53.8	56.2	56.9	57.4	57.9	57.8	57.5	57.5	59.1
	Manufacturing	59.6	60.3	61.5	62.1	62.1	63.7	63.6	60.7	61.9	
Italy	G.D.P.	43.5 <sup>(1)</sup>	45.4	49.5	52.8	52.0	51.3	51.6	51.9	51.8	53.7
	Manufacturing	53.6 <sup>(1)</sup>	57.8	61.7	65.3	62.8	60.9	63.4	62.7	63.7	
Japan	G.D.P.	44.5 <sup>(2)</sup>	45.9	45.6	46.0	48.4	48.2	47.2	46.4	46.7	
	Manufacturing (large companies)				39.6	41.8	41.0	40.3	41.3	40.9	41.3
Netherlands	G.D.P.	49.2	50.9	54.7	57.2	58.1	60.1	59.4	59.8	60.3	62.0
	Manufacturing	54.6	56.6	60.2	62.5	62.8	64.5	63.6	63.4	64.2	
Sweden	Manufacturing	66.5 <sup>(2)</sup>	67.1	70.1	69.4	69.3	70.9	71.0	69.9	69.0	
Canada	G.D.P.	55.4	57.5	58.6	58.2	59.2	60.0	61.8	61.9	62.8	64.0
Belgium	G.D.P.	48.4 <sup>(3)</sup>	50.3	52.9	54.4	55.2	56.6	56.7	56.8	57.0	

(1) 1951-4 (2) 1952-4 (3) 1953-4

Note: Output is gross of depreciation in every case, and it is domestic output, i.e. excluding income from abroad. In the case of U.K. and U.S. it is net of stock appreciation; for other countries there is no mention of stock appreciation and it is assumed that output is defined net of stock appreciation.

The wage ratio is wages and salaries and employers' contributions to social security as a proportion of output.

For U.S. and U.K. the corporate sector excludes financial companies.

Source: Glyn and Sutcliffe (1972), pp. 264-5.

Figure 1

Source: Glyn and Sutcliffe (1972), p.76.

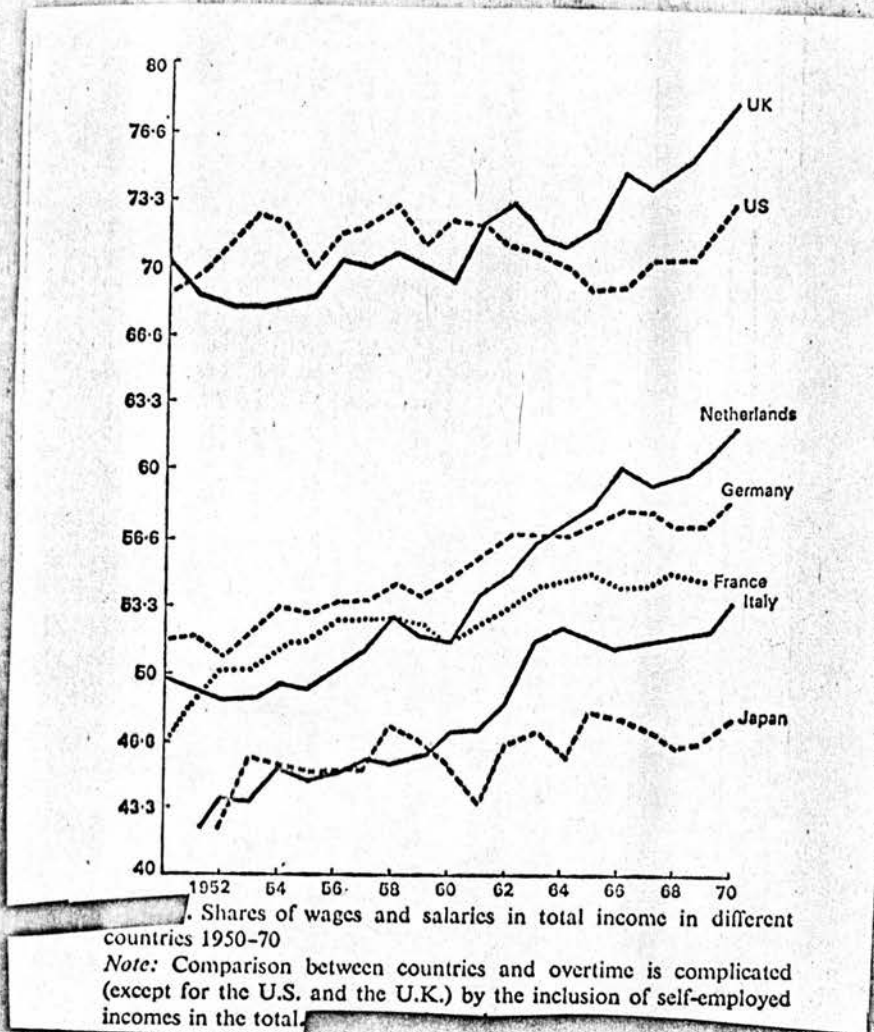


TABLE 2

Prestations de Sécurité sociale en % du revenu disponible des ménages

Prestations	Alle- magne (RF)	France	Italie	Pays- Bas	Belgique	Luxem- bourg
En % du revenu disponible des ménages	22,3	21,6	20,0	25,4	21,1	24,3

Source: Commission (1971(2)), p.119.



TABLE 3

## DEFENSES

(en % du revenu national)

-transferts exclus-

	Années	B	D	F	I	L	N
Prestations en nature	1965	3,4	3,6	1,5	3,6	2,8	3,3
	1970	3,8	4,4	5,3	4,4	3,1	4,8
	1975	4,0	5,4	5,5	5,5	3,3	6,0
Prestations en espèces (1)	1965	14,1	14,7	14,3	13,7	17,1	15,3
	1970	15,7	15,5	14,3	13,9	18,5	18,4
	1975	15,8	16,4	14,9	12,9	19,3	19,7
Total des prestations	1965	17,5	18,3	18,8	17,3	19,9	18,6
	1970	19,4	19,9	19,6	18,3	21,6	23,2
	1975	19,8	21,8	21,5	18,4	22,6	26,1
Frais administratifs	1965	1,0	1,0	0,7	0,8	0,7	0,7
	1970	1,0	1,1	0,8	0,8	0,6	0,8
	1975	0,8	1,0	0,7	0,8	0,6	0,8
Autres dépenses	1965	-	-	0,5	0,4	0,2	-
	1970	0,1	-	0,6	1,2	0,2	-
	1975	-	-	0,5	0,9	0,1	-
Total des dépenses sans transferts (1)	1965	18,4	19,2	20,0	18,5	20,8	19,3
	1970	20,5	21,0	21,0	20,3	22,4	24,0
	1975	20,6	22,8	22,9	20,1	23,3	27,2

(1) Italie 1975 - Si les prestations familiales étaient revalorisées comme les salaires les prestations en espèces et le total des dépenses devrait être majoré de 0,8

Source: Commission (1971(4)), p.32.

CHAPTER 5

APPENDICES



# APPENDIX 1

## Social Security Cases dealt with by the Court of Justice

Case No.	Parties	Date of Judgment	Provisions of R.3. concerned	Country of origin	National Court referring	Reference
75/63	<u>Unger</u> (1) v. Bestuur der Bedrijfsvereniging	19.3.64	Art. 4, 19	NL	<u>Centrale Raad van Beroep</u> (2)	X, 347
92/63	<u>Nonnenmacher</u> v. Sociale Verzekeringsbank	9.6.64	Art. 12	NL	<u>Centrale Raad van Beroep</u>	X, 557
100/63	<u>Van der Veen</u> v. Sociale Verzekeringsbank	15.7.64	Art. 1, 2, 3, 27, 28.	NL	<u>Centrale Raad van Beroep</u>	X, 1105
24/64	<u>Dingemans</u> v. Sociale Verzekeringsbank	2.12.64	Art. 1, 2, 3, 24	NL	<u>Centrale Raad van Beroep</u>	X, 1259
31/64	"De Sociale Voorzorg" v. Bertholet	11.3.65	Art. 4, 52	NL	Arrondissementsrechtbank Maastricht	XI, 131
33/64	Betriebskrankenkasse der Hesper Torfwerke v. <u>Van Dijk</u>	11.3.65	Art. 4, 52	NL	Arrondissementsrechtbank Assen	XI, 131
33/65	<u>Dekker</u> v. Bundesversicherungsanstalt für Angestellte	1.12.65	Art. 22	D	Landessozialgericht Berlin	XI, 1111
44/65	<u>Hessische Knappschaft</u> v. <u>Singer</u>	9.12.65	Art. 4, 52	F	Cour d'Appel, Colmar	XI, 1191
61/65	<u>Vaassen-Goebbels</u> v. Beambtenfonds voor het Mijnbedrijf	30.6.66	Art. 1, 4, 22	NL	Scheidsgerecht van het Beambtenfonds voor het Mijnbedrijf, Heerlen	XII, 377
4/66	<u>Hagenbeek-Labots</u> v. Raad van Arbeid, Arnhem	13.7.66	Art. 27, 28. Art. 7, R.130/63	NL	<u>Centrale Raad van Beroep</u>	XII, 617

# APPENDIX I (Contd.)

Case No.	Parties	Date of Judgment	Provisions of R.3. concerned	Country of origin	National Court referring	Reference
1/67	Ciechelski v. Caisse regionale de securite sociale, Orleans	5.7.67	Art.27,28	F	Cour d'Appel d'Orleans	XIII,235
2/67	De Moor v. Caisse de Pension des Employes Privés	5.7.67	Art.27,28	L	Cour supérieure de Justice, formée en cour de cassation	XIII,255
6/67	Gerra v. Institut national d'Assurance maladie-invalidite	5.7.67	Art.45	B	Conseil d'Etat belge	XIII,283
9/67	Colditz v. Caisse d'Assurance Vieillesse des Travailleurs salaries de Paris	5.7.67	Art.27,28. Art.30-36, 83, R.4.	F	Cour d'Appel, Paris	XIII, 297
18/67	Cossutta v. Office National des Pensions pour Ouvriers	30.11.67	Art.28	B	Conseil d'Etat belge	XIII, 399
22/67	Caisse régionale de securite sociale du nord-est v. Goffart	30.11.67	Art.27,28	F	Cour de Cassation fr.	XIII,413.
14/67	Landesversicherungsanstalt Rheinland-Pfalz v. <u>Welchner</u>	5.12.67	Art. 1,27, 28, An. G.	D	Bundessozialgericht	XIII, 427
19/67	Sociale Verzekeringsbank v. <u>Van der Vecht</u>	5.12.67	Art.12,13 43	NL	Central Raad van Beroep	XIII,445
11/67	Office national des Pensions pour Ouvriers v. <u>Couture</u>	12.12.67	Art.27,28 Art.30-36, 83,R.4.	B	Conseil d'Etat belge	XIII,487
12/67	<u>Guissart</u> v. Etat belge	13.12.67	Art.27,28	B	Conseil d'Etat belge	XIII,551.
19/68	<u>De Cicco</u> v. Landesversicherungsanstalt Schwaben	19.12.68	Art. 1,2,4, 27	D	Sozialgericht Augsburg	XIV,689
28/68	Caisse régionale du nord v. <u>Torrekens</u>	7.5.69	Art. 1,2,3,	F	Cour de Cassation fr	XV,125



# APPENDIX I (Contd.)

Case No.	Parties	Date of Judgment	Provisions of R.3 concerned	Country of origin	National Court referring	Reference
27/69	Caisse de maladie des CFL "Entr'aide médicale" v. compagnie belge d'Assurances Générales	12.11.69	Art. 52	L	Cour supérieure de Justice	XV,405
34/69	Caisse d'assurance vieillesse v. <u>Duffy</u>	10.12.69	Art. 11	F	Cour d'Appel, Paris	XV,597
68/69	Bundesknappschaft v. <u>Brock</u>	14.4.70	Art.53, An. G.	D	Bundessozialgericht	XVI,171
3/70	Caisse de Compensation v. <u>Di Bella</u>	17.6.70	Art. 42	B	Conseil de Prud'hommes d'Appel, Mons	XVI,415
32/70	Union nationale des mutualités socialistes v. <u>La Marca</u>	1.12.70	Art. 16,17 Art.28,R.4.	B	Commission de Réclamation, Liege	XVI,987
35/70	<u>Manpower</u> v. La Caisse primaire d'assurance maladie	12.12.70	Art.13	F	Commission de première instance du contentieux de la sécurité sociale et de la mutualité agricole du Bas-Rhin, Strasbourg	XVI, 1251
23/71	<u>Janssen</u> v. Alliance Nationale des Mutualités chrétiennes	27.10.71	Art. 4	B	Tribunal du travail, de l'Arondis- sement de Tongres	XVII,857
26/71	<u>Gross</u> v. Caisse Régionale d'assurance vieillesse des travailleurs salariés de Strasbourg	10.11.71	Art.27,28	F	Commission de première instance, etc. du Bas-Rhin, Strasbourg	XVII,871
27/71	<u>Keller</u> v. Caisse régionale, etc., Strasbourg	10.11.71	Art.27,28	F	Commission de première instance, etc. du Bas-Rhin, Strasbourg	XVII,885
28/71	<u>Höhn</u> v. Caisse régionale, etc., Strasbourg	10.11.71	Art. 27,28	F	Commission de première instance, etc. du Bas-Rhin, Strasbourg	XVII,993

APPENDIX I (Cont'd.)

Case No.	Parties	Date of Judgment	Provisions of R.3 concerned	Country of origin	National Court referring	Reference
80/71	<u>Merluzzi v. Caisse Primaire Centrale d'Assurance maladie de la Région Parisienne</u>	22.3.72	Annex G, IV, B.	F	Commission de première instance etc. Paris.	XVIII, 175
1/72	<u>Frilli v. l'Etat Belge</u>	22.6.72	Art. 2	B	Tribunal du travail, Bruxelles	XVIII, 457
2/72	<u>Mirru v. La Caisse régionale d'assurance maladie de Paris</u>	6.6.72	Art. 1, 27, 28, 33.	F	Cour d'appel, Paris	XVIII, 333
14/72	<u>Heinze v. Landesversicherungsanstalt Rheinprovinz</u>	16.11.72	Art. 26, 27	D	<u>BSG</u>	XVIII, 1105
15/72	<u>Land Niedersachsen v. Landesversicherungsanstalt, Hannover.</u>	16.11.72	Art. 26, 27	D	<u>BSG</u>	XVIII, 1127
16/72	<u>Allgemeine Ortskrankenkasse, Hamburg v. Landesversicherungsanstalt, Schleswig-Holstein</u>	16.11.72	Art. 26, 27	D	<u>BSG</u>	XVIII, 1141
45/72	<u>Merola v. Le Fonds national de retraite des ouvriers mineurs</u>	13.12.72	Art. 45	B	Tribunal du travail, Hasselt.	XVIII, 1255
73/72	<u>Bentzinger v. Steinbruchs Berufsgenossenschaft</u>	1.3.73	Art. 13	D	LSG Baden-Württemberg	XIX, 283
78/72	<u>L'Etoile-Syndicat général v. de Waal</u>	11.4.73	Art. 52	NL	Arrondissementsrechtbank, Breda	XIX, 499
82/72	<u>Walder v. Bestuur der Sociale Verzekeringsbank.</u>	7.6.73	Art. 6, Annex D, R3; Art 7, Annex II, R. 1408/71	NL	<u>Centrale Raad van Beroep</u>	XIX, 599



# APPENDIX I (Contd.)

Case No.	Parties	Date of Judgment	Provisions of R. 3 concerned	Country of origin	National Court referring	Reference
13/73	Angenieux et al. v. <u>Hakenberg</u>	12.7.73	Art. 1, 12, 13.	F	Cour de Cassation	XIX, 935
35/73	<u>Kunz</u> v. Bundesversicherungsanstalt für Angestellte	11.10.73	Art. 22	D	<u>BSG</u>	XIX, 1025
51/73	Bestuur der Sociale Verzekeringsbank v. <u>Smicja</u>	7.11.73	Art. 8, 10, R. 3; Art. 3, 10, R. 1408.	NL	<u>Centrale Raad van Beroep</u>	XIX, 1213
110/73	<u>Fliege</u> v. Caisse régionale d'assurance maladie de Strasbourg	10.10.73	Art. 10	F	<u>Cour de Cassation</u>	XIX, 1001
130/73	<u>Vandeweghe</u> et al v. Berufsgenossenschaft für die chemische Industrie	27.11.73	Art. 1, R. 1408/71	D	LSG Baden-Württemberg	XIX, 1329
140/73	Direction régionale de la sécurité sociale de la région Parisienne et al v. <u>Mancuso</u> et al.	6.12.73	Art. 27, 28	F	Cour d'appel, Paris	XIX, 1449.
187/73	<u>Callemeyn</u> v. Etat belge	28.5.74	Art. 4	B	Tribunal du travail, Tournai	XX, 553
191/73	<u>Niemann</u> v. Bundesversicherungsanstalt für Angestellte	28.5.74	Art. 28	D	SG Freiburg	XX, 571

Notes: (1) Names of parties underlined are the names by which the case is usually known.

(2) Courts underlined are courts of last instance.

APPENDIX 2

Selective list of R3 Cases dealt with by National Courts in  
each of the Member States

Court	Date	Art. cons- idered	Art. 177 used	Reference	Comments
A. BELGIUM					
1. Conseil d'Etat	28.5.64	10		3b ES105	Apparently right
2. Commission d'appel II	1.1.65	19		6-7 Rappt. An. p.47	
3. Corr. Tongres	24.9.65	12		CDE, 1969, p.67 Pasicrisie 1966, III, p.111	Right
4a. <u>Conseil d'Etat</u>	27.1.67	45	✓	Jup. B1	Guerra (6/67)
b. Reply considered	?				
5a. <u>Conseil d'Etat</u>	24.3.67	28	✓	Jup. B3	Guissart (12/67)
b. Reply considered	5.6.69	28		CDE, 1971 p. 65	
6a. <u>Conseil d'Etat</u>	24.3.67	28	✓	Jup. B2	Couture (11/67)
b. Reply	9.5.68	28		Jup. B6	
7a. Rechtbank Brugge	10.4.67	13(a)		CDE, 1970, p.200	Apparently right
8a. <u>Conseil d'Etat</u>	11.5.67	28	✓	Jup. B4	Consutta (18/67)
b. Reply	30.5.68	28		CDE, 1970 205	
9. Justice de paix du second canton de Liège	23.11.67	29		CDE, 1970, 201 Journal des Juges de Paix, 1968, 179.	Apparently right
10. Tribunal civil de Tongres	24.11.67	12		Jup. B5; CDE, 1970, 202	Wrong



11. Cour d'Appel, Bruxelles	31.10.68	52	Jup.B7, CDE,1970 209; Dr Soc 1968, 267	Quaere?
12. Rechtbank Antwerpen	20.12.68	52	CDE,1970 211; Jup.B8; RTDE 1969,323	Correct appli- cation of Court's judg- ment 31/64
13a. Conseil de Prud' hommes de prem- ière instance, Mons.	30.1.69	42	3g ES 80	Apparently right
b. Conseil de Prud' hommes d'Appel, Mons	15.11.69	42	✓	De Bella (3/70)
14. Rechtbank Antwerpen	27.3.69	52	CDE 1970, 211,RTDE 1969, 323	Correct appli- cation of 31/64
15. <u>Conseil d'Etat</u>	26.2.70	27,28	Rec. des Arrets et Avis du Cd'E,228 (Feb-mars 1970)	Applies Court's judgment in 1/67, 12/67.
16. Commission de Réclamation, Liège	3.6.70	16,17	✓	La Marca (37/70)
B. GERMANY				
1. <u>BSG</u>	11.2.60		2 Rappt. An 5B;	
2. <u>BSG</u>	25.8.60	4	3 Rappt. An 37	Apparently wrong
3a. SG Hanover	4.12.63	53,An. G	Bib. 669	First stage of Brock
b. LSG Niedersachsen	16.8.66	53,An. G	Bib. 669	
c. <u>BSG</u>	30.10.69	53,An. ✓ G	Bib. 669	Brock (68/69)
d. <u>BSG</u> : Reply	8.6.70	53,An. G	Bib. 669	Action withdrawn
4a. SG Berlin	3.6.64	22	Bib. 129	Apparently right
b. LSG Berlin	26.5.55	22	✓	Dekker (33/65)
c. LSG - Reply?				

5. <u>BSG</u> (12 Senat)	26.4.66	52	6-7 Rappt An 47; 3e ES 109, 118	Wrong in view of 14/67 "Acte clair" applied to avoid Art. 177
6. <u>BGH</u>	26.4.66	52	L-C 375; 3d ES75	Develops national law in the light of Community law.
7a. <u>BSG</u> (4. Senat)	1.3.67	28, An.G ✓	Bib. 517	Welchner (14/67)
b. Reply considered	24.5.68	28, An.G	Bib. 517	
8. SG Karlsruhe	12.4.67	17	3g ES 79	Quaere?
9. LSG Bayern	23.4.68	4	3f ES 100, 105-6	Wrong in view of 19/68
10. <u>BSG</u>	24.7.68	28	8 Dec. nat. D99	
11a. SG Augsburg	30.7.68	1(2), 4, ✓ 24,27	3f ES 96 ff. Bib. 524	De Ciccio (19/68)
b. Reply?				
12. LSG Baden-Württemberg	30.8.68	8, 19.	3f ES 96-97, 101-2.	Apparently right Applies 75/63.
13. LSG Rheinland-Pfalz	29.1.69	1	3g ES 75	On lump-sum payments to widows on remarriage.
14. LSG Rheinland-Pfalz	5.3.69	An. G.	3g ES 77	Apparently right.
15. SG Hamburg	5.5.69	16,27,28	3g ES 79, 80.	Apparently right.
16. SG Berlin	22.9.69	22	3g ES 77	
17. LSG Rheinland-Pfalz	12.11.69	An. G.	3g ES 83	
18. <u>BSG</u>	12.11.69	1	CDE 1971, p.58 (1970-1) 8 CML Rev. 116-117	Quaere? Con- tradicts LSG Rheinland- Pfalz of 29.1.69 Cf. Art. 10, R. 1408/71.



C. FRANCE

1a.	Trib. de grande instance de Strasbourg	4.10.63	4, 52			Wrong
b.	Cour d'appel de Colmar	1.6.65	4, 52	✓	Jup. F4	Hessische Kaappschaft (49/15)
c.	Reply?					
2a.	Cour d'appel de Douai	8.10.63	43,1,2,3, 27,28.		Jup. F1	Wrong on Art. 43
b.	<u>Cassation</u>	1.12.65	43		86 Gaz. Pal. 4 (no. 36-39, 5-8/2/1966) Dr. Soc. 1966,248-9	Annulled Douai 8.10.63
c.	<u>Cassation</u>	24.10.68	1,2,3, 27, 28.	✓	CDE 1970, 189; RTDE 1969,138. Dr. Soc. 1969,331.	Torrekens (28/68)
d.	Reply	12.2.70	1,2,3,27, 28.		(1971) CML Rev. 407. Bib. 690	
3.	Cour d'appel de Paris	4.3.64	27,28		Jup. F2; 4 CML. Rev. 70-71	Wrong; Nani
4.	<u>Cassation</u>	16.2.65	31		Jup. F3; L-C 350-356	Quaere correctness? Gosset
5.	Cour d'appel, Grenoble	3.1.66	52		3c ES 120; L-C 374.	Applies 31/64
6a.	Cour d'appel, Orleans	22.12.66	27,28	✓	Jup. F5	Ciechelski (1/67)
b.	Reply	9.11.67	27,28		Jup. F9; CDE 1971, 63-4.	
7a.	Cour d'appel, Paris	28.1.67	28	✓	Bib. 420	Colditz (9/67)
b.	Reply	8.12.67	28		Jup. F10	
8.	Trib. Correctionnel de Dieppe	7.3.67	52		L-C 375; Gaz. Pal. 14.10.67, p.5.	Apparently right

9a. Première instance du contentieux du Haut-Rhin	8.3.67	4, 19			Wrong on Art. 4
b. Cour d'appel, Colmar	16.11.67	4, 19			Wrong on Art. 4
c. <u>Cassation</u>	14.1.70	4, 19		Dr. Soc. 332 (1970-1) 8 CML Rev. 408	Upheld Colmar, but corrected it on Art. 4. Apparently right.
10a. <u>Cassation</u>	24.4.67	28	✓	Jup. F6	Goffare (22/67)
b. Reply	21.3.68	78		Jup. F8	
11a. Première instance du contentieux de Paris	11.7.67	1		3g ES 75	Wrong
b. Cour d'appel, Paris	27.6.69	1, 4, 11	✓	3g ES 76	Duffy (34/67)
c. Reply?					
12. Cour d'appel, Colmar	15.11.67	52; Art. 177 EEC		Jup. F7	Correctly applies 31/64
13. Cour d'appel, Colmar	31.10.68	47		EuR 1970, p.50; 3g ES 81	
14. Cour d'appel, Lyon	18.12.68	28		Jup. F11; CDE 1971, 64; 3f ES 102	Quaere
15a. Cour d'appel, Dijon	8.1.69	27, 28		Dr.Soc. 1970, p.150-2	Applies 1/67
b. <u>Cassation</u>	2.7.70	27, 28		Dr.Soc. 1970, p. 150-2	Applies arguments in 1/67 without referring to it.
16. <u>Cassation</u>	26.6.69	40		CDE 1971, 66-7.	Apparently right
17. <u>Cassation</u>	11.12.69	40		CDE 1971, 67.	Five judgments, as Cass. 26.6.69
18. <u>Cassation</u>	14.1.70	40		Dr.Soc. 1970, 334-5	Apparently right
19a. Première instance du contentieux du Bas-Rhin	17.6.70	13	✓		Manpower (35/70)
b. Reply?					
20. Cour d'appel, Paris	13.11.70	27, 28; 177 EEC		86 JT, 134 (No.4732 (1971))	Applies 1/67; holds Court's interpretations to be binding



D. ITALY

1. Tribunale de Milano	26.9.68	1	3f ES 98; RDIPP 1968, p.921	Wrong interpretation of scope of application of 51 R3.
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E. LUXEMBOURG

1. Commission des rentes de l'Etablissement d'assurance contre la vieillesse et l'invalidité	1960		2 Rappt.An. 68	
2. Conseil arbitral des assurances sociales	19.4.62	28	3f ES 102-3; 6-7 Rappt. An. 49	Apparently wrong
3a. <u>Cour supérieure de Justice formée en Cour de Cassation</u>	5.1.67	28	✓ Jup. L1; RTDE 1967, 697	De Moor (2/67)
b. Reply	12.6.69	28	Bib. 695	2½ years!
4. Cour supérieure de Justice	27.4.68	1,2	3f ES 97-8	Correct
5a. Cour supérieure de Justice (chambre des appels civils)	20.5.69		✓ Bib. 695	Caisse d'Entr'aide (27/69)
b. Reply	16.6.70	4,52	Bib. 695	

F. NETHERLANDS

1a. RB Roermond	1.4.62	12,13	Jup. P-B1	Wrong: holds that Art. 1 is exclusive
b. <u>CRB</u>	19.11.63	12,73	Jup. P-B 2	Confirms RB Roermond
2. RB Roermond	5.6.62	31	Jup. P-B 8	Apparently right
3. <u>CRB</u>	27.10.62	28,43	Jup. P-B 9; 4 Rappt. An. 55; RSV 1963 no. 28, p.77	CRB considers itself bound by decision of Commission administrative

4. <u>CRB</u>	2.11.62	31		4 Rappt. An. 54; RSV 1962, p.211
5a. RB Amsterdam	24.11.62	4,19		Jup.P-B 5 Wrong
b. <u>CRB</u>	21.5.63	4,19	✓	Jup.P-B 6 Unger (75/63)
c. Reply	7.7.64	4,19		Jup.P-B 7; (1964) 3 CML Rev, 546
6. RB Zwolle	18.12.62	27,28		3b ES 113 Apparently right
7. RB Utrecht	27.12.62	An. B		3b ES 116- Correct 7
8. RB Roermond	22.1.63	27,28		3b ES 102, Apparently 113, 117 right
9. RB Arnhem	24.1.63	27,28		3b ES 113 Apparently right
10a. RB Amsterdam	19.3.63	12		Bib 156 Wrong
b. <u>CRB</u>	16.10.63	12	✓	Bib 156 Nonnenmacher (92/63)
c. Reply	15.7.64	12		Jup. P-B 11
11. RB Rotterdam	26.6.63	27,28,43		3b ES 114, Apparently 115,117 right
12a. RB Amsterdam	22.10.63	1,2,3,24, 27,28		Jup P-B 17, RSV 1965, no 68,p.202.
b. <u>CRB</u>	29.4.64	1,2,3,24, ✓ 27,28		Jup. P-B 17 Dingemans (24/64)
c. Reply	1.4.65	1,2,3,24, 27,28		Jup. P-B 18.
13a. <u>CRB</u>	30.10.63	1,2,3,27, ✓ 28		Jup. P-B 15 Van der Veen (100/63)
b. Reply (I) Van der Veen Case No. 1963/4	7.10.64	1,2,3,27, 28		Jup. P-B 16
(II) W-W Case No. 1963/9	7.10.64	1,2,3,27,28 28		Jup. P-B Wrong 14



(iii) Case No. 1963/159	1.4.65	1,2,3,27,28	6-7 Rappt. An 51	
14. Gerechtshof's- Gravenhage	5.11.63	4,12	P-B 16	Quaere
15. <u>CRB</u>	23.3.64	47	3c ES 81	
16a RB Groningen	7.4.64	12	Jup. P-B 19	Correct
b <u>CRB</u>	20.10.65	4,5,12	Jup. P-B 20	Confirms RB Groningen on different grounds
17. <u>Hoge Raad</u>	15.4.64	2,11	(1967-8) 5 CML Rev 212-214	Quaere?
18a Arrondissements- rechtbank Maastricht	28.5.64	4,52	✓ Jup. P-B 3	Bertholet (31/64)
b Reply	18.11.65	4,52	Bib. 322	
19a Arrondissements- rechtbank Assen	23.7.64	4,52	✓ Jup. P-B 4	Van Dijk (33/64)
b Reply	15.6.65	4,52	Bib. 323; 6 CML Rev. 412	
20. RB Groningen	3.8.64	4,5,12	Jup. P-B 12	Quaere?
21. <u>CRB</u>	29.9.64	6	Jup. P-B 13	Correct
22. Kantonrechter Delft	12.11.64	4,52	6 CML Rev 411	Wrong
23. Gerechtshof's- Hertogenbosch	2.7.65	2	36 ES 79	
24a RB Arnhem	26.7.65	27,28 R130/63, Art. 7	RSV 1966, no. 137, p.423	
b <u>CRB</u>	16.2.66	27,28	✓ Jup. P-B 4	Hagenbeek (4/66)
c Reply	5.10.66	27,28	Jup. P-B 25	
25. <u>CRB</u>	20.10.65	4,5	Jup. P-B 21	Quaere?
26a Scheidsgerecht van het BFM	10.12.65	1,4,22	✓ Bib. 323	Vrassen- Göbbels (61/65)
b Reply	4.10.66	1,4,22	Jup. P-B 30	

27a. RB Amsterdam	14.12.65	27,28,47	Jup. P-B 22	
b. <u>CRB</u>	8.6.66	27,28,47	Jup. P-B 23	Amsterdam reversed on fact
28. <u>Hoge Raad</u>	22.12.65	2,12	Jup. P-B 31; CDE 1967 81	Quaere?
29a. RB Zwolle (Steenbergen)	15.2.66	27,28	Jup. P-B 26	Correct
b. <u>CRB</u>	5.10.66	27,28	Jup. P-B 27	Reversed Zwolle; wrong
30a. RB Zwolle (Wind-Hoechna)	15.2.66	27,28	Jup. P-B 28	As above
b. <u>CRB</u>	5.10.66	27,28	Jup. P-B 29	As above
31a. RB Amsterdam	26.4.66	27,28	Jup. P-B 32; RSV 1967, no. 81, p.228.	
b. <u>CRB</u>	16.2.67	27,28	Jup. P-B 32; Confirms CDE 1969,69; Amsterdam RSV 1967, Apparently no. 81, p.125 right	
32a. RB Groningen	13.6.66		Jup. P-B 33; RSV 1967, no. 35, p.92	
b. <u>CRB</u>	23.11.66		Jup. P-B 33	
33a. RB Groningen	25.7.66		Jup. P-B 34; RSV 1967, no. 31, p.79.	
34a. RB Amsterdam	9.8.66	27,28	Jup. P-B 36; RSV 1967, no. 110, p.323	
b. <u>CRB</u>	16.2.67	27,28	CDE 1969, 68. Confirms RSV 1967, Amsterdam no. 110, Apparently p.323 right	
35a. RB Roermond	20.12.66	27,28	Jup. P-B 35; RSV 1968, no. 26, p.78; 6 CML Rev, 223-4	
b. <u>CRB</u>	4.10.67	27,28	Jup. P-B 35; Confirms 6 CML Rev, Roermond 223; RSV 1968,p.76	



36a. <u>CRB</u>	10.2.67	12,13	✓ Bib. 544	Van der Vecht (19/67)
b. Reply				
37a. RB Roermond	21.2.67	4,27,28	CDE 1969,70; RSV 1967, no. 111, p.496; Jup. P-B 37	Wrong
b. <u>CRB</u>	19.7.67	24,3,4,27, 28	CDE 1969,70; RSV 1967, no. 161, p.495; Jup.P-B 37	Confirms Roermond
38. <u>CRB</u>	3.1.68	An D, G. R.130/63, Art. 7	(1969-70) 7 CML Rev, 355; CDE 1970,202	
39. Gerechtshof's- Hertogenbosch	27.2.68	52	CDE 1970, 203, 6 CML Rev. 413; Ned.Jur. 1969, no. 285	Applies 31/64
40. <u>CRB</u>	18.6.68	27,28	7 CML Rev. 353; CDE 1970,206.	Right; reverses earlier jurisprudence to follow 1/67 etc.
41. Gerechtshof's Hertogenbosch	23.8.68	12,4	Dec.nat. M40; 17 Ned Belasting- rechtspraak 281 (no.10/1969)	
42. Rechtbank Middelburg	11.12.68	4,52	CDE 1970, 210; Verkeersrecht 1969, no. 34, p.64.	Apparently right

APPENDIX 2

Abbreviations

Bib.:	Bibliographie de Jurisprudence Européenne: Décisions relatives aux Traités instituant les Communautés Européenne. Publication du Service de documentation de la Cour de Justice des Communautés Européennes.
CDE:	Cahiers de Droit Europeen
CML Rev.:	Common Market Law Review
Dec. nat:	Décisions nationales relatives au Droit Communautaire. Published periodically by the Commission.
Dr. Soc.:	Droit Social
3b ES, 3g ES, etc.:	Kölner Schriften zum Europarecht, Volume 3 - Répertoire de la Jurisprudence relative aux Traités instituant les Communautés Européennes. Published annually (a, b, c etc.).
EuR:	Europarecht.
Gaz Pal.:	Gazette du Palais
J.T.:	Journal des Tribunaux
Jup.	Collection Jupiter. Recueils pratiques du Droit des Affaires dans les pays du Marche Commun. Traité de Rome. Jurisprudence, Vol. II. Art. 51.
L-C:	Lyon-Caen (1969)
Ned. Jur.:	Nederlandse Jurisprudentie.
Rappt. An.:	Rapport Annuel de la Commission Administrative pour la sécurité sociale des travailleurs migrants
RDIPP:	Rivista di Diritto Internazionale Privato e Processuale.
RSV:	Rechtspraak Sociale Verzekering.
RTDE:	Revue Trimestrielle de Droit Europeen



**APPENDIX 3**

**Extracts from Regulations No. 3 and No. 1408/71**

A. Regulation No. 3

B. Regulation No. 1408/71

**Dispositif du règlement n° 3 du Conseil  
concernant la sécurité sociale des travailleurs migrants**

**TITRE I**

**DISPOSITIONS GÉNÉRALES**

*Article premier*

Aux fins de l'application du présent règlement :

(a) les termes « territoire d'un État membre » et « ressortissant d'un État membre » sont définis à l'annexe A ;

(b) le terme « législation » désigne les lois, les règlements et les dispositions statutaires, existants et futurs, de chaque État membre, qui concernent les régimes et branches de la sécurité sociale visés aux paragraphes (1) et (2) de l'article 2 du présent règlement ;

(c) le terme « convention de sécurité sociale » désigne tout instrument, bilatéral ou multilatéral, intervenu ou à intervenir exclusivement entre deux ou plusieurs États membres et tout autre instrument multilatéral qui lie ou liera deux ou plusieurs États membres dans le domaine de l'ensemble de la sécurité sociale ou de l'un ou de plusieurs des régimes et branches de la sécurité sociale visés aux paragraphes (1) et (2) de l'article 2 du présent règlement, ainsi que les accords de toute nature conclus dans le cadre desdits instruments ;

(d) le terme « autorité compétente » désigne pour chaque État membre le ministre, les ministres ou une autre autorité correspondante dont relèvent, dans l'ensemble ou dans une partie quelconque du territoire de l'État dont il s'agit, les régimes de la sécurité sociale ;

(e) le terme « institution » désigne, pour chaque État membre, l'organisme ou l'autorité chargé d'appliquer tout ou partie de la législation ;

(f) le terme « institution compétente » désigne :

(i) s'il s'agit d'une assurance sociale, l'institution désignée par l'autorité compétente de l'État membre intéressé ou l'institution à laquelle l'assuré est affilié au moment de

la demande de prestations, ou envers laquelle il a ou continuerait à avoir droit aux prestations s'il résidait sur le territoire de l'État membre où il était occupé en dernier lieu ;

(ii) s'il s'agit d'un régime autre qu'une assurance sociale, relatif aux obligations de l'employeur concernant les prestations visées au paragraphe (1) de l'article 2 du présent règlement, soit l'employeur ou l'assureur subrogé, soit, à défaut, un organisme ou une autorité à déterminer par l'autorité compétente de l'État membre intéressé ;

(iii) s'il s'agit d'un régime non contributif ou d'un régime d'allocations familiales, l'organisme ou l'autorité chargé de liquider des prestations suivant les dispositions du présent règlement ;

(g) le terme « pays compétent » désigne l'État membre sur le territoire duquel se trouve l'institution compétente ;

(h) le terme « résidence » signifie le séjour habituel ;

(i) les termes « institution du lieu de résidence » et « institution du lieu de séjour » désignent :

(i) l'institution qui est compétente pour le lieu où l'intéressé réside ou séjourne, suivant les dispositions de la législation de l'État membre en cause ;

(ii) si une telle institution n'est pas désignée par la législation, l'institution que l'autorité compétente de l'État membre en question désignera aux fins de l'application du présent règlement ;

(j) le terme « réfugié » a la signification qui lui est attribuée à l'article premier de la convention relative au statut des réfugiés, signée à Genève, le 28 juillet 1951 ;

(k) — \*)



(l) **\*\***) le terme « travailleur saisonnier » désigne le travailleur salarié ou assimilé qui se rend sur le territoire d'un des États membres pour y effectuer, pour le compte d'un ou de plusieurs employeurs de cet État, un travail à caractère saisonnier d'une durée ne devant pas excéder 8 mois, et qui séjourne sur le territoire dudit État pendant la durée de son travail. Par travail à caractère saisonnier, il convient d'entendre le travail dépendant du rythme des saisons, se répétant automatiquement chaque année;

La preuve de la qualité de saisonnier est établie par la production du contrat de travail visé par les services de l'emploi de l'État membre sur le territoire duquel le travailleur saisonnier vient exercer son activité ou d'un document visé par ces services et attestant que l'intéressé dispose d'un emploi saisonnier sur ledit territoire.

(m) l'expression « travailleur de qualification confirmée dans les professions du charbon et de l'acier » désigne un travailleur qui est muni de la carte de travail de la Communauté européenne du charbon et de l'acier au sens de la décision du 8 décembre 1954 relative à l'application de l'article 69 du traité du 18 avril 1951 instituant la Communauté européenne du charbon et de l'acier, et le terme « professions du charbon et de l'acier » désigne les métiers figurant en annexe à ladite décision ;

(n) le terme « membres de la famille » désigne les personnes définies ou admises comme telles, ou désignées comme membres du ménage par la législation du pays de leur résidence ; toutefois, si cette législation ne considère comme membres de la famille ou membres du ménage que les personnes vivant sous le toit du travailleur, cette condition, dans les cas où l'on peut faire appel au présent règlement, est réputée remplie lorsque ces personnes sont principalement à la charge de ce travailleur ;

(o) le terme « survivants » désigne les personnes définies comme telles par la législation applicable ; toutefois, si cette législation ne considère comme survivants que les personnes qui vivaient sous le toit du travailleur décédé, cette condition, dans les cas où l'on peut faire appel au présent règlement, est réputée remplie lorsque ces personnes étaient principalement à la charge de ce travailleur ;

(p) le terme « périodes d'assurance » comprend les périodes de cotisation ou d'emploi, telles qu'elles sont définies ou prises en considération comme périodes d'assurance selon la législation concernant un

régime contributif sous laquelle elles ont été accomplies ;

(q) le terme « périodes d'emploi » désigne les périodes d'emploi, telles qu'elles sont définies ou prises en considération selon la législation sous laquelle elles ont été accomplies ;

(r) le terme « périodes assimilées » désigne les périodes assimilées aux périodes d'assurance ou, le cas échéant, aux périodes d'emploi, telles qu'elles sont définies par la législation sous laquelle elles ont été accomplies et dans la mesure où elles sont reconnues équivalentes par cette législation aux périodes d'assurance ou d'emploi ;

(s) les termes « prestations », « pensions », « rentes » désignent les prestations, pensions, rentes, y compris tous les éléments à la charge des fonds publics, les majorations, allocations de réévaluation ou allocations supplémentaires, ainsi que les prestations en capital qui peuvent être substituées aux pensions ou rentes ;

(t) le terme « allocations au décès » désigne toute somme versée en une seule fois en cas de décès.

## Observations

### (Article premier)

\*) L'alinéa (k) ainsi rédigé :

*(k) le terme « travailleur frontalier » a la signification qui lui est attribuée dans les conventions de sécurité sociale bilatérales ou dans d'autres accords bilatéraux intervenus ou à intervenir entre deux États membres, ou désigne, si une définition du terme « travailleur frontalier » n'a pas été convenue entre les États membres intéressés, les travailleurs qui, tout en conservant leur résidence dans la zone limitrophe de l'un des États membres où ils rentrent normalement au moins une fois par semaine, sont occupés dans la zone limitrophe de l'autre des États membres; les zones limitrophes seront déterminées d'un commun accord par les autorités compétentes des États membres en question ;*

a été abrogé par l'article premier du règlement n° 36/63/CEE du Conseil du 2 avril 1963 — JO n° 62 du 20 avril 1963.

Cette abrogation a pris effet le 1<sup>er</sup> février 1964 (cf. article 26 du règlement n° 36/63/CEE précité et article 4 du règlement n° 3/64/CEE du Conseil du 18 décembre 1963 — JO n° 5 du 17 janvier 1964).

**\*\*)** Ce texte remplace (cf. article premier du règlement n° 73/63/CEE du Conseil du 11 juillet 1963 — JO n° 112 du 24 juillet 1963) le texte initial rédigé comme suit :

- (1) le terme « travailleur saisonnier » a la signification qui lui est attribuée dans les conventions de sécurité sociale bilatérales ou dans d'autres accords bilatéraux intervenus ou à intervenir entre deux États membres, ou désigne, si une définition dudit terme n'a pas été convenue entre les deux États membres intéressés, les travailleurs qui se rendent pour une durée déterminée d'un pays dans l'autre pour y effectuer, pour le compte d'un employeur de ce dernier pays, un travail salarié ou assimilé de caractère saisonnier, tout en conservant leur résidence dans l'autre pays où continue à résider leur famille. La Commission administrative précisera, en tant que de besoin, les activités considérées comme ayant un caractère saisonnier.

Cette modification a pris effet le 1<sup>er</sup> février 1964 (cf. article 15 du règlement n° 73/63/CEE précité et article 3 du règlement n° 2/64/CEE du Conseil du 18 décembre 1963 — JO n° 5 du 17 janvier 1964).

Les articles 13 et 14 du règlement 73/63/CEE précité précisent ce qui suit :

#### Article 13

(1) Le présent règlement n'ouvre aucun droit au paiement de prestations pour une période antérieure à la date de son entrée en vigueur.

(2) Toute période d'assurance ou période assimilée, ainsi que, le cas échéant, toute période d'emploi ou période assimilée, ou toute période de résidence accomplie en vertu de la législation d'un État membre avant la date d'entrée en vigueur du présent règlement est prise en considération pour la détermination du droit aux prestations s'ouvrant conformément aux dispositions du présent règlement.

(3) Sous réserve des dispositions du paragraphe (1) du présent article, une prestation est due en vertu du présent règlement, même si elle se rapporte à un événement antérieur à la date de son entrée en vigueur. A cet effet, toute prestation qui n'a pas été liquidée ou qui a été suspendue en raison de la résidence de l'intéressé sur le territoire d'un État membre autre que le pays où se trouve l'institution débitrice, sera, à la demande de l'intéressé, liquidée ou rétablie à partir de l'entrée en vigueur du présent règlement, sous réserve que les droits antérieurement liquidés n'aient pas donné lieu à un règlement en capital.

(4) Quant aux droits résultant de l'application du paragraphe précédent, les dispositions prévues par les législations des États membres en ce qui concerne la déchéance et la prescription des droits ne sont

pas opposables aux intéressés, si la demande mentionnée au paragraphe précédent est présentée dans un délai de deux ans à compter de l'entrée en vigueur du présent règlement. Si la demande est présentée après l'expiration de ce délai, le droit aux prestations qui n'est pas frappé de déchéance ou qui n'est pas prescrit est acquis à partir de la date de la demande à moins que les dispositions plus favorables de la législation d'un État membre ne soient applicables.

#### Article 14

Nonobstant les dispositions du présent règlement, restent applicables les dispositions particulières aux travailleurs saisonniers figurant dans une convention de sécurité sociale qui, d'une manière générale, peuvent être considérées comme plus favorables ou qui, lorsqu'il s'agit seulement de modalités d'application sans influence sur les droits des intéressés, ont donné satisfaction sur le plan de la pratique administrative. Ces dispositions seront respectivement énumérées dans l'annexe D du règlement n° 3 et dans l'annexe 6 du règlement n° 4 par un règlement ultérieur du Conseil arrêté sur proposition de la Commission en même temps que le règlement prévu aux paragraphes (1) et (2) de l'article 4 du règlement n° 36/63/CEE du Conseil concernant la sécurité sociale des travailleurs frontaliers.

#### Article 2

(1) Le présent règlement s'applique à toutes les législations qui visent :

- (a) les prestations de maladie et de maternité ;
- (b) les prestations d'invalidité, y compris celles destinées à maintenir ou à améliorer la capacité de gain, autres que celles qui sont servies en cas d'accidents du travail ou de maladies professionnelles ;
- (c) les prestations de vieillesse ;
- (d) les prestations de survivants autres que les prestations qui sont servies en cas d'accidents du travail ou de maladies professionnelles ;
- (e) les prestations en cas d'accidents du travail ou de maladies professionnelles ;
- (f) les allocations au décès ;
- (g) les prestations de chômage ;
- (h) les allocations familiales.



(2) Le présent règlement s'applique aux régimes de sécurité sociale généraux et spéciaux, contributifs et non contributifs, y compris les régimes relatifs aux obligations de l'employeur concernant les prestations visées au paragraphe précédent.

(3) Le présent règlement ne s'applique ni à l'assistance sociale et médicale, ni aux systèmes des prestations en faveur de victimes de la guerre ou de ses conséquences, ni aux régimes spéciaux des fonctionnaires publics ou assimilés.

### Article 3

(1) L'annexe B au présent règlement précise, en ce qui concerne chaque État membre, les législations de sécurité sociale auxquelles s'applique le règlement et qui sont en vigueur sur son territoire à la date de l'adoption du présent règlement.

(2) Chaque État membre notifiera, conformément aux dispositions du paragraphe (1) de l'article 54 du présent règlement, tout amendement qui doit être apporté à l'annexe B par suite de l'adoption d'une nouvelle législation. La notification sera effectuée dans un délai de trois mois à partir de la publication de ladite législation.

### Article 4

(1) Les dispositions du présent règlement sont applicables aux travailleurs salariés ou assimilés qui sont ou ont été soumis à la législation de l'un ou de plusieurs des États membres, et qui sont des ressortissants de l'un des États membres, ou qui sont des apatrides ou des réfugiés résidant sur le territoire de l'un des États membres, ainsi qu'aux membres de leurs familles et à leurs survivants.

(2) De plus, les dispositions du présent règlement sont applicables aux survivants des travailleurs salariés ou assimilés qui ont été soumis à la législation de l'un ou de plusieurs des États membres sans égard à la nationalité de ces derniers, lorsque ces survivants sont des ressortissants de l'un des États membres ou sont des apatrides ou des réfugiés résidant sur le territoire de l'un des États membres.

(3) — \*)

(4) — \*)

(5) Les dispositions du présent règlement ne sont applicables ni aux agents diplomatiques et consulaires de carrière, y compris les fonctionnaires

appartenant au cadre des chancelleries ni aux personnes qui, appartenant au cadre d'une administration gouvernementale d'un État membre, sont envoyées par leur gouvernement sur le territoire d'un autre État membre.

(6) L'application des dispositions du présent règlement aux gens de mer sera déterminée par un règlement ultérieur.

(7) — \*)

### Observations

(Article 4)

\*) Les paragraphes (3), (4) et (7) ainsi rédigés :

(3) *Toutefois, les dispositions du présent règlement ne sont applicables ni aux travailleurs frontaliers ni aux travailleurs saisonniers, dans la mesure où les prestations dont ils bénéficient sont ou seront réglementées par des dispositions particulières à ces travailleurs, figurant dans une convention de sécurité sociale.*

(4) *En outre, les dispositions énumérées à l'annexe C, en ce qui concerne respectivement les travailleurs frontaliers et les travailleurs saisonniers occupés sur le territoire de l'État membre mentionné à ladite annexe, ne sont pas appliquées par les institutions de cet État membre ; au regard des travailleurs frontaliers et des travailleurs saisonniers qui sont ressortissants de l'État membre mentionné à l'annexe C, ou apatrides ou réfugiés résidant sur le territoire dudit État, la même limitation intervient de la part de celui des autres États membres sur le territoire duquel ils sont occupés. Toutefois, dans ces cas, les travailleurs susvisés continuent à bénéficier des avantages correspondants que leur confèrent les conventions de sécurité sociale liant l'État membre mentionné à l'annexe C à l'autre État membre.*

(7) *Des règlements ultérieurs fixeront des dispositions particulières aux travailleurs frontaliers et aux travailleurs saisonniers ; à partir de l'entrée en vigueur desdits règlements, les dispositions des paragraphes (3) et (4) du présent article cesseront d'être applicables.*

ont été supprimés par l'article premier du règlement n° 73/63/CEE du Conseil du 11 juillet 1963 — JO n° 112 du 24 juillet 1963. (Pour les travailleurs frontaliers, cf. règlement n° 36/63/CEE du Conseil du 2 avril 1963, reproduit à la page 133)

Cette suppression a pris effet le 1<sup>er</sup> février 1964 (cf. article 15 du règlement n° 73/63/CEE précité et article 3 du règlement n° 2/64/CEE du Conseil du 18 décembre 1963 — JO n° 5 du 17 janvier 1964).

## Article 5

A moins qu'il n'en soit stipulé autrement d'une façon expresse dans le présent règlement, les dispositions de celui-ci se substituent, en ce qui concerne les personnes auxquelles il s'applique, aux dispositions :

(a) des conventions de sécurité sociale intervenues exclusivement entre deux ou plusieurs États membres et des accords complémentaires à ces conventions ;

(b) de toute convention de sécurité sociale multilatérale qui lie deux ou plusieurs États membres et un ou plusieurs pays qui ne sont pas des États membres, pour autant qu'il s'agit de cas dans le règlement desquels n'intervient pas un régime de l'un des derniers pays.

## Article 6

(1) Les dispositions du présent règlement ne portent pas atteinte aux obligations découlant :

(a) d'une convention quelconque adoptée par la Conférence internationale du travail ;

(b) des accords intérimaires européens du 11 décembre 1953 concernant la sécurité sociale, conclus entre les gouvernements des membres du Conseil de l'Europe.

(2) Nonobstant les dispositions du présent règlement, restent applicables :

(a) les dispositions de l'accord du 27 juillet 1950 concernant la sécurité sociale des bateliers rhénans ;

(b) les dispositions de la convention européenne du 9 juillet 1956 concernant la sécurité sociale des travailleurs des transports internationaux ;

(c) — \*

(d) — \*

(e) d'autres dispositions des conventions de sécurité sociale, pour autant qu'elles soient énumérées dans l'annexe D du présent règlement.

(3) Deux ou plusieurs États membres ayant conclu des conventions de sécurité sociale dont certaines dispositions sont énumérées dans l'annexe D du présent règlement peuvent, après avis conforme de la Commission administrative visée à l'article 43 du présent règlement, apporter à l'annexe D les amendements qu'ils considèrent nécessaires en les notifiant conformément aux dispositions du paragraphe (1) de l'article 54 du présent règlement.

(4) Les dispositions du présent règlement ne portent pas atteinte aux dispositions de la législation de chacun des États membres concernant la participation des assurés ou des autres catégories de personnes intéressées à la gestion de la sécurité sociale ou les modalités de l'affiliation à l'institution compétente.

## Observations

## (Article 6)

\*) Les alinéas (c) et (d) ainsi rédigés :

(c) *les dispositions particulières aux travailleurs frontaliers et aux travailleurs saisonniers, figurant dans une convention de sécurité sociale ;*

(d) *les dispositions des conventions de sécurité sociale qui, en vertu de la dernière phrase du paragraphe (4) de l'article 4 du présent règlement restent applicables aux travailleurs frontaliers et aux travailleurs saisonniers ;*

ont été abrogés par l'article 4 du règlement n° 36/63/CEE du Conseil du 2 avril 1963 — JO n° 62 du 20 avril 1963.

Cette abrogation a pris effet le 1<sup>er</sup> février 1964 (cf. article 26 du règlement n° 36/63/CEE précité et article 4 du règlement n° 3/64/CEE du Conseil du 18 décembre 1963 — JO n° 5 du 17 janvier 1964).

## Article 7

(1) Deux ou plusieurs États membres peuvent conclure entre eux, en tant que de besoin, des conventions fondées sur les principes et l'esprit du présent règlement.

(2) Chaque État membre notifiera, conformément aux dispositions du paragraphe (1) de l'article 54 du présent règlement, toute convention conclue entre lui et un autre État membre en vertu du paragraphe précédent.

## Article 8

Les personnes qui résident sur le territoire de l'un des États membres et auxquelles les dispositions du présent règlement sont applicables, sont soumises aux obligations et sont admises au bénéfice de la législation de sécurité sociale de tout État membre dans les mêmes conditions que les ressortissants de celui-ci.



*Article 9*

(1) En vue de l'admission à l'assurance obligatoire, volontaire ou facultative continuée conformément à la législation de l'État membre sur le territoire duquel l'intéressé réside, les périodes d'assurance et les périodes assimilées accomplies en vertu des législations des autres États membres sont prises en compte, dans la mesure où cela est nécessaire, comme périodes d'assurance accomplies en vertu de la législation du premier État.

(2) Les dispositions du paragraphe précédent ne sont applicables qu'aux travailleurs salariés ou assimilés qui ne peuvent bénéficier de l'assurance obligatoire en raison de la législation du pays d'emploi.

*Article 10*

(1) Les pensions ou rentes et les allocations au décès acquises en vertu des législations de l'un ou de plusieurs des États membres ne peuvent subir aucune réduction, ni modification, ni suspension, ni suppression, ni confiscation du fait que le bénéficiaire réside sur le territoire d'un État membre autre que celui où se trouve l'institution débitrice.

(2) Toutefois, les dispositions du paragraphe précédent ne sont pas applicables aux prestations énumérées ci-après, dans la mesure où celles-ci sont inscrites dans l'annexe E du présent règlement:

(a) Les avantages spéciaux de l'assurance vieillesse, accordés aux travailleurs dont l'âge était trop élevé au moment de l'entrée en vigueur de la législation applicable ;

(b) les prestations transitoires au titre d'un régime non contributif en faveur des personnes qui ne peuvent plus bénéficier des prestations normales de sécurité sociale à cause de leur âge avancé ;

(c) les prestations d'assistance spéciale au titre d'un régime non contributif en faveur de certaines catégories de personnes qui sont incapables de gagner leur vie à cause de leur état de santé.

(3) Après avis conforme de la Commission administrative visée à l'article 43 du présent règlement, chaque État membre notifiera, conformément aux dispositions du paragraphe (1) de l'article 54 du présent règlement, tout amendement qui doit être

apporté à l'annexe E. Cette notification sera effectuée dans un délai de trois mois à partir de la publication de ladite législation.

*Article 11*

(1) Sauf en ce qui concerne l'assurance vieillesse-décès (pensions), d'une part, et l'assurance invalidité lorsqu'elle donne lieu à répartition de la charge entre les institutions de deux ou de plusieurs États membres, d'autre part, les dispositions du présent règlement ne peuvent conférer ni maintenir le droit de bénéficier, en vertu des législations des États membres, de plusieurs prestations de même nature ou de plusieurs prestations se rapportant à une période d'assurance ou période assimilée.

(2) Les clauses de réduction ou de suspension prévues par la législation d'un État membre, en cas de cumul d'une prestation avec d'autres prestations de sécurité sociale ou avec d'autres revenus, ou du fait de l'exercice d'un emploi, sont opposables au bénéficiaire, même s'il s'agit de prestations acquises sous un régime d'un autre État membre ou s'il s'agit de revenus obtenus, ou d'un emploi exercé, sur le territoire d'un autre État membre. Toutefois, cette règle n'est pas applicable aux cas où des prestations de même nature sont acquises conformément aux dispositions des articles 26 et 28 du présent règlement.

*TITRE II*DISPOSITIONS DÉTERMINANT  
LA LÉGISLATION APPLICABLE*Article 12*

Sous réserve des dispositions du présent titre, les travailleurs salariés ou assimilés occupés sur le territoire d'un État membre sont soumis à la législation de cet État, même s'ils résident sur le territoire d'un autre État membre ou si leur employeur ou le siège de l'entreprise qui les occupe se trouve sur le territoire d'un autre État membre.

sont à la charge de cette institution si l'une des institutions débitrices de la pension ou de la rente se trouve sur le territoire du pays où le titulaire ou le membre de sa famille bénéficie des prestations en nature. Sinon, elles restent à la charge de l'institution telle qu'elle est précisée par les dispositions de la dernière phrase du paragraphe (1) ou par les dispositions du paragraphe (3) du présent article ; dans ce cas, les dispositions du paragraphe (5) de l'article 19 du présent règlement sont applicables par analogie.

(7) Si la législation d'un État membre prévoit des retenues de cotisation à la charge du titulaire de la pension ou de la rente, pour la couverture des prestations en nature, l'institution débitrice de la pension ou de la rente, à la charge de laquelle se trouvent les prestations en nature, est autorisée à opérer ces retenues dans les cas visés par le présent article.

#### Article 23

(1) \*) Les prestations en nature servies en vertu des dispositions des paragraphes (1), (2), (7) et (9) de l'article 19, des paragraphes (1)\*\*) et (6) de l'article 20, des paragraphes (2), (3) et (5) et de la dernière phrase du paragraphe (6) de l'article 22 du présent règlement font l'objet d'un remboursement aux institutions qui les ont servies.

(2) \*) En ce qui concerne les prestations en nature servies dans les cas visés à l'article 19, au paragraphe (6) de l'article 20, aux paragraphes (2) et (3) et à la dernière phrase du paragraphe (6) de l'article 22, l'institution compétente est tenue de rembourser le montant desdites prestations.

(3) \*) En ce qui concerne les prestations en nature servies aux membres de la famille visés au paragraphe (1)\*\*) de l'article 20 et au paragraphe (5) de l'article 22, l'institution compétente est tenue de rembourser des montants équivalant aux trois quarts des dépenses afférentes auxdites prestations.

(4) Le remboursement est déterminé et effectué suivant les modalités à fixer par la Commission administrative.

(5) Les autorités compétentes de deux ou de plusieurs États membres peuvent convenir, notamment dans un souci de simplification, qu'aucun remboursement ne sera effectué entre les institutions de leurs pays.

#### Observations

##### (Article 23)

\*) Les paragraphes (1) à (3) remplacent (cf. article 2 du règlement n° 73/63/CEE du Conseil du 11 juillet 1963 — JO n° 112 du 24 juillet 1963 — cf. également observation au sujet de l'article premier alinéa (1)) le texte initial rédigé comme suit :

*(1) Les prestations en nature servies en vertu des dispositions des paragraphes (1), (2) et (7) de l'article 19, du paragraphe (1) de l'article 20, des paragraphes (2), (3) et (5) et de la dernière phrase du paragraphe (6) de l'article 22 du présent règlement font l'objet d'un remboursement aux institutions qui les ont servies.*

*(2) En ce qui concerne les prestations en nature servies dans les cas visés à l'article 19, aux paragraphes (2), (3) et à la dernière phrase du paragraphe (6) de l'article 22, l'institution compétente est tenue de rembourser le montant desdites prestations.*

*(3) En ce qui concerne les prestations en nature servies aux membres de la famille visés au paragraphe (1) de l'article 20, et au paragraphe (5) de l'article 22, l'institution compétente est tenue de rembourser des montants équivalant aux trois quarts des dépenses afférentes auxdites prestations.*

Cette modification a pris effet le 1<sup>er</sup> février 1964 (cf. article 15 du règlement n° 73/63/CEE précité et article 3 du règlement n° 2/64/CEE du Conseil du 18 décembre 1963 — JO n° 5 du 17 janvier 1964).

\*\*) La référence au paragraphe (3) de l'article 20 a été supprimée avec effet au 1<sup>er</sup> septembre 1964 par l'article premier du règlement n° 108/64/CEE du Conseil du 30 juillet 1964 — JO n° 127 du 7 août 1964.

#### Chapitre 2

##### Invalidité

#### Article 24

(1) Les prestations auxquelles un assuré peut prétendre sont liquidées conformément aux dispositions des articles suivants selon que l'assuré a accompli des périodes :

(a) exclusivement en vertu de législations du type A d'après lesquelles les prestations en cas d'invalidité sont calculées, en principe, indépendamment de la durée des périodes accomplies,

(b) exclusivement en vertu de législations du type B, d'après lesquelles les prestations en cas



d'invalidité sont calculées, en principe, compte tenu de la durée des périodes accomplies,

(c) en vertu de législations du type A et du type B.

(2) L'annexe F du présent règlement précise, en ce qui concerne chaque État membre, les législations du type A et celles du type B qui sont en vigueur sur tout ou partie de son territoire à la date de l'adoption du présent règlement. Chaque État membre notifiera, conformément aux dispositions du paragraphe (1) de l'article 54 du présent règlement, tout amendement qui doit être apporté à l'annexe F par suite d'une nouvelle législation. Cette notification sera effectuée dans un délai de trois mois à dater de la publication de ladite législation.

#### *Article 25*

Dans les cas visés à l'alinéa (a) du paragraphe (1) de l'article 24, les conventions de sécurité sociale peuvent comporter des dispositions particulières différentes des règles fixées par l'article 26 du présent règlement.

#### *Article 26*

(1) Dans les cas autres que ceux visés à l'article 25 du présent règlement, les dispositions du chapitre 3 ci-après sont applicables par analogie.

(2) Lorsque, dans un État membre, l'assurance-invalidité est entrée en vigueur postérieurement à l'assurance-vieillesse, les périodes d'assurance-vieillesse et les périodes assimilées accomplies selon la législation dudit État membre sont retenues fictivement comme périodes accomplies dans l'assurance-invalidité du même pays, qu'il s'agisse de périodes accomplies avant ou après l'entrée en vigueur de l'assurance-invalidité.

(3) Si, après suspension de la pension ou de l'indemnité d'invalidité, l'assuré recouvre son droit, le service des prestations est repris par l'organisme débiteur de la pension ou de l'indemnité primitivement accordée. Si, après une suppression de la pension ou de l'indemnité d'invalidité, l'état de l'assuré justifie l'octroi d'une pension ou d'une indemnité d'invalidité, celles-ci sont liquidées suivant les règles qui auraient été applicables si aucune pension ou indemnité n'avait été accordée antérieurement.

(4) Si, d'après la législation de l'un des États membres, le montant de la prestation varie avec le nombre des membres de la famille, l'institution qui détermine cette prestation prend également en compte, en vue de son calcul, le nombre des membres de la famille résidant sur le territoire d'un État membre autre que celui où se trouve ladite institution.

(5) La prestation est transformée, le cas échéant, en pension de vieillesse, dans les conditions prévues par la législation en vertu de laquelle elle a été accordée et conformément aux dispositions du chapitre 3 ci-après.

### **Chapitre 3**

#### **Vieillesse et décès (pensions)**

#### *Article 27*

(1) En vue de l'acquisition, du maintien ou du recouvrement du droit aux prestations, lorsqu'un assuré a été soumis successivement ou alternativement à la législation de deux ou plusieurs États membres, les périodes d'assurance et les périodes assimilées accomplies en vertu de la législation de chacun des États membres sont totalisées pour autant qu'elles ne se superposent pas.

(2) Lorsque la législation d'un État membre subordonne l'octroi de certaines prestations à la condition que les périodes d'assurance aient été accomplies dans une profession soumise à un régime spécial, seules sont totalisées pour l'admission au bénéfice de ces prestations, les périodes accomplies en vertu des régimes correspondants des autres États membres et les périodes accomplies dans la même profession en vertu d'autres régimes desdits États membres, pour autant qu'elles ne se superposent pas. Si, nonobstant la totalisation desdites périodes, l'assuré ne remplit pas les conditions lui permettant de bénéficier desdites prestations, les périodes dont il s'agit sont également totalisées pour l'admission au bénéfice des prestations du régime général de ces États membres.

#### *Article 28*

(1) Les prestations auxquelles un assuré visé à l'article 27 du présent règlement ou ses survivants peuvent prétendre en vertu des législations des

États membres selon lesquelles l'assuré a accompli des périodes d'assurance ou des périodes assimilées sont liquidées de la manière suivante :

(a) L'institution de chacun de ces États membres détermine, d'après sa propre législation, si l'intéressé réunit les conditions requises pour avoir droit aux prestations prévues par cette législation, compte tenu de la totalisation des périodes visée à l'article précédent ;

(b) si le droit est acquis en vertu de l'alinéa précédent, ladite institution détermine, pour ordre, le montant de la prestation à laquelle l'intéressé aurait droit si toutes les périodes d'assurance ou périodes assimilées, totalisées suivant les modalités visées à l'article précédent, avaient été accomplies exclusivement sous sa propre législation; sur la base dudit montant, l'institution fixe le montant dû au prorata de la durée des périodes accomplies sous ladite législation avant la réalisation du risque par rapport à la durée totale des périodes accomplies sous les législations de tous les États membres intéressés avant la réalisation du risque ; ce montant constitue la prestation due à l'intéressé par l'institution dont il s'agit ;

(c) s'il résulte de la législation de l'un des États membres que le calcul des prestations repose sur un salaire moyen, une cotisation moyenne, ou une majoration moyenne, ou sur la relation ayant existé, pendant les périodes de cotisation accomplies, entre le salaire brut de l'intéressé et la moyenne des salaires bruts de tous les assurés à l'exclusion des apprentis, ces moyennes ou ces chiffres proportionnels sont déterminés pour le calcul des prestations à la charge de l'institution de cet État, compte tenu des seules périodes d'assurance et périodes assimilées accomplies en vertu de la législation dudit État membre, ou compte tenu du salaire brut de l'intéressé afférent à ces périodes. Si, selon la législation d'un des États membres, les prestations sont calculées par rapport au montant des salaires gagnés ou des cotisations versées, les salaires ou les cotisations concernant les périodes d'assurance accomplies en vertu des régimes des autres États membres sont pris en considération, par l'institution qui détermine les prestations, sur la base de la moyenne des salaires ou des cotisations constatées pour les périodes d'assurance accomplies en vertu de son propre régime. Dans chaque législation sont prises en considération les règles de revalorisation, sous

réserve des modalités qui pourront être fixées par un règlement ultérieur afin d'éviter toute double revalorisation ;

(d) si, d'après la législation de l'un des États membres, le montant de la prestation varie avec le nombre des membres de la famille, l'institution qui détermine cette prestation prend en compte, en vue de son calcul, le nombre des membres de la famille résidant sur le territoire d'un État membre autre que celui où se trouve ladite institution ;

(e) si l'intéressé, compte tenu de la totalisation des périodes visée à l'article précédent, ne remplit pas, à un moment donné, les conditions exigées par toutes les législations qui lui sont applicables, mais satisfait seulement aux conditions de l'une ou de plusieurs d'entre elles, le montant de la prestation est déterminé conformément aux dispositions de l'alinéa (b) du présent paragraphe ; toutefois, si le droit est ainsi ouvert au regard de deux législations au moins et s'il n'est pas nécessaire de faire appel aux périodes accomplies sous les législations dont les conditions ne sont pas remplies, ces périodes ne sont pas prises en considération pour l'application des dispositions de l'alinéa (b) du présent paragraphe ;

(f) si l'intéressé ne remplit pas, à un moment donné, les conditions exigées par toutes les législations qui lui sont applicables, mais satisfait aux conditions d'une seule d'entre elles, sans qu'il soit nécessaire de faire appel aux périodes accomplies sous une ou plusieurs des autres législations, le montant de la prestation est déterminé en vertu de la seule législation au regard de laquelle le droit est ouvert et compte tenu des seules périodes accomplies sous cette législation ;

(g) dans les cas visés aux alinéas (e) et (f) du présent paragraphe, les prestations déjà liquidées sont revisées conformément aux dispositions de l'alinéa (b) du présent paragraphe au fur et à mesure que les conditions exigées par une ou plusieurs des autres législations sont satisfaites, compte tenu de la totalisation des périodes visée à l'article précédent.

(2) Un règlement ultérieur fixera les modalités d'application du paragraphe (1) du présent article, notamment celles relatives au maintien des droits du bénéficiaire d'une pension, accordée en vertu d'une législation, au regard d'une autre législation pour laquelle des droits ne sont pas encore ouverts.



(3) Si le montant de la prestation à laquelle l'intéressé peut prétendre sans application des dispositions de l'article 27, pour les seules périodes d'assurance et périodes assimilées accomplies en vertu de la législation d'un État membre, est supérieur au total des prestations résultant de l'application des paragraphes précédents du présent article, il a droit, de la part de l'institution de cet État, à un complément égal à la différence. Si l'intéressé a droit à des compléments de la part des institutions de deux ou de plusieurs États membres, il ne bénéficie que du complément le plus élevé. La charge de ce complément est répartie entre les institutions desdits États en tenant compte des compléments que chacune d'elles aurait dû servir; les modalités de cette répartition seront fixées par un règlement ultérieur.

(4) Sous réserve de la disposition de l'alinéa (f) du paragraphe (1) du présent article, les intéressés qui peuvent se prévaloir des dispositions du présent chapitre ne peuvent prétendre au bénéfice d'une pension en vertu des seules dispositions de la législation d'un État membre.

#### Chapitre 4

#### Accidents du travail et maladies professionnelles

##### Article 29

(1) \*) Tout travailleur salarié ou assimilé devenu victime d'un accident du travail ou d'une maladie professionnelle bénéficie, lorsqu'il se trouve sur le territoire d'un État membre autre que le pays compétent, des prestations en nature servies par l'institution du lieu de résidence ou de séjour à la charge de l'institution compétente.

En cas de transfert de résidence, le travailleur admis au bénéfice des prestations à charge d'une institution d'un des États membres doit, avant le transfert, obtenir l'autorisation de cette institution, laquelle tient dûment compte des motifs de ce transfert. Cette autorisation est également nécessaire pour le travailleur qui va se faire soigner sur le territoire d'un État membre autre que le pays compétent sans pour autant y transférer sa résidence, ainsi que pour le travailleur saisonnier qui rentre se faire soigner sur le territoire de l'État membre où il a sa résidence.

(2) En ce qui concerne l'étendue, la durée et les modalités du service des prestations en nature qui

sont servies dans les cas visés au paragraphe précédent, les dispositions des paragraphes (3), (4) et (5) de l'article 19 du présent règlement sont applicables par analogie.

(3) Dans le cas où il n'existe pas d'assurance accidents du travail ou maladies professionnelles sur le territoire de l'État membre dans lequel le travailleur se trouve, ou lorsqu'une telle assurance existe mais ne prévoit pas d'institutions pour le service des prestations en nature, celles-ci sont servies par l'institution du lieu de séjour ou de résidence responsable pour le service des prestations en nature en cas de maladie.

(4) Si une législation subordonne la gratuité complète des prestations en nature à l'utilisation, par le bénéficiaire, du service médical organisé par l'employeur, les prestations en nature accordées conformément aux paragraphes précédents du présent article sont considérées comme ayant été servies par un tel service médical.

(5) Si le régime de la réparation des accidents du travail du pays compétent n'a pas le caractère d'une assurance obligatoire, le service des prestations en nature, suivant les dispositions des paragraphes précédents du présent article, est réputé être effectué à la demande de l'institution compétente.

(6) Les prestations en nature servies dans les cas visés au paragraphe (1) du présent article font l'objet d'un remboursement aux institutions qui les ont servies, conformément aux dispositions des paragraphes (2), (4) et (5) de l'article 23 du présent règlement.

(7) Dans les cas visés au paragraphe (1) du présent article, les prestations en espèces sont servies à la charge de l'institution compétente, conformément à la législation qui lui est applicable, et suivant les modalités à fixer, éventuellement d'un commun accord, par les autorités compétentes des États membres intéressés.

(8) \*\*) Lorsque la législation d'un État membre prévoit la prise en charge des frais de transport de la victime soit jusqu'à son lieu de résidence, soit jusqu'à l'établissement hospitalier, et lorsque la victime est un travailleur saisonnier, les frais de son transport jusqu'à son lieu de résidence ou un établissement hospitalier sur le territoire d'un autre État membre sont pris en charge sous réserve de l'autorisation de l'institution compétente, laquelle tient dûment compte des motifs de ce transport; ces frais sont assumés par cette institution suivant les dispositions de la législation qu'elle applique.

cle premier paragraphe (2) du règlement n° 73/63/CEE du Conseil du 11 juillet 1963 — JO n° 112 du 24 juillet 1963.

Cette suppression a pris effet le 1<sup>er</sup> février 1964 (cf. article 15 du règlement n° 73/63/CEE précité et article 3 du règlement n° 2/64/CEE du Conseil du 18 décembre 1963 — JO n° 5 du 17 janvier 1964).

#### Article 51

Le recouvrement des cotisations dues à une institution de l'un des États membres peut se faire sur le territoire d'un autre État membre, suivant la procédure administrative et avec garanties et privilèges applicables au recouvrement des cotisations dues à une institution correspondante de ce dernier État. L'application de cette disposition fera l'objet d'accords bilatéraux qui pourront également concerner la procédure judiciaire du recouvrement.

#### Article 52

Si une personne qui bénéficie de prestations en vertu de la législation d'un État membre pour un dommage survenu sur le territoire d'un autre État a, sur le territoire de ce deuxième État, le droit de réclamer à un tiers la réparation de ce dommage, les droits éventuels de l'institution débitrice à l'encontre du tiers sont réglés comme suit :

(a) lorsque l'institution débitrice est subrogée, en vertu de la législation qui lui est applicable, dans les droits que le bénéficiaire détient à l'égard du tiers, chaque État membre reconnaît une telle subrogation ;

(b) lorsque l'institution débitrice a un droit direct contre le tiers, chaque État membre reconnaît ce droit.

L'application de ces dispositions fera l'objet d'accords bilatéraux.

### TITRE V

#### DISPOSITIONS TRANSITOIRES ET FINALES

#### Article 53

(1) Le présent règlement n'ouvre aucun droit au paiement de prestations pour une période antérieure à la date de son entrée en vigueur.

(2) Toute période d'assurance ou période assimilée, ainsi que, le cas échéant, toute période d'emploi ou période assimilée ou toute période de résidence accomplie en vertu de la législation d'un État membre avant la date d'entrée en vigueur du présent règlement est prise en considération pour la détermination du droit aux prestations s'ouvrant conformément aux dispositions du présent règlement.

(3) Sous réserve des dispositions du paragraphe (1) du présent article, une prestation est due en vertu du présent règlement, même si elle se rapporte à un événement antérieur à la date de son entrée en vigueur. A cet effet, toute prestation qui n'a pas été liquidée ou qui a été suspendue à cause de la nationalité de l'intéressé ou en raison de sa résidence sur le territoire d'un État membre autre que celui où se trouve l'institution débitrice, sera, à la demande de l'intéressé, liquidée ou rétablie à partir de l'entrée en vigueur du présent règlement sous réserve que les droits antérieurement liquidés n'aient pas donné lieu à un règlement en capital.

(4) Les droits des intéressés ayant obtenu, antérieurement à l'entrée en vigueur du présent règlement, la liquidation d'une pension ou rente, pourront être révisés à leur demande. La révision aura pour effet d'accorder aux bénéficiaires, à partir de l'entrée en vigueur du présent règlement, les mêmes droits que si le règlement avait été en vigueur au moment de la liquidation. La demande de révision doit être introduite dans un délai de deux ans à compter de l'entrée en vigueur du présent règlement.

(5) Quant au droit résultant de l'application des paragraphes (3) et (4) du présent article, les dispositions prévues par les législations des États membres en ce qui concerne la déchéance et la prescription des droits ne sont pas opposables aux intéressés, si la demande visée aux paragraphes (3) et (4) du présent article est présentée dans un délai de deux ans à compter de l'entrée en vigueur du présent règlement. Si la demande est présentée après l'expiration de ce délai, le droit aux prestations qui n'est pas frappé de déchéance ou qui n'est pas prescrit est acquis à partir de la date de la demande à moins que les dispositions plus favorables de la législation d'un État membre ne soient applicables.

(6) — \*)

(7) — \*)



(8) Jusqu'à l'entrée en vigueur du règlement prévu au paragraphe (6) de l'article 4 du présent règlement, les dispositions des conventions de sécurité sociale existantes, en ce qui concerne les gens de mer, restent applicables.

(2) Le président du Conseil notifiera à la Commission de la Communauté économique européenne, à la Haute Autorité de la Communauté européenne du charbon et de l'acier et aux États membres, toute notification reçue en application du paragraphe (1) du présent article.

#### Observations

(Article 53)

\*) Les paragraphes (6) et (7) rédigés comme suit :

*(6) Le délai prévu à l'article 20 paragraphe (2) et repris par le paragraphe (5) de l'article 40 du présent règlement, court à partir de l'entrée en vigueur de celui-ci pour les travailleurs qui sont occupés à cette date.*

*(7) Pour les travailleurs italiens occupés en France à la date de l'entrée en vigueur du présent règlement les autorités compétentes françaises et italiennes régleront, d'un commun accord, les modalités d'adaptation des dispositions du paragraphe (5) de l'article 40 du présent règlement, dans la mesure où elles se réfèrent au paragraphe (2) de l'article 20, à la situation découlant d'accords antérieurs.*

ont été abrogés avec effet au 1<sup>er</sup> septembre 1964 par l'article premier du règlement n° 108/64/CEE du Conseil du 30 juillet 1964 — JO n° 127 du 7 août 1964.

#### Article 54

(1) Les notifications à faire en application des dispositions du paragraphe (2) de l'article 3, du paragraphe (3) de l'article 6, du paragraphe (2) de l'article 7, du paragraphe (3) de l'article 10, du paragraphe (2) de l'article 24 et du paragraphe (3) de l'article 36 du présent règlement seront adressées au président du Conseil de la Communauté économique européenne.

#### Article 55

Un règlement fixera les modalités d'application du présent règlement.

#### Article 56 \*)

Le présent règlement entrera en vigueur le 1<sup>er</sup> janvier 1959 ; toutefois, les dispositions des articles 43 et 44 entreront en vigueur le troisième jour suivant la publication du présent règlement.

#### Observations

(Article 56)

\*) Ce texte remplace avec effet au 16 décembre 1958 (cf. article 88 du règlement n° 4 du 3 décembre 1958 — JO n° 30 du 16 décembre 1958) le texte initial rédigé comme suit :

*Le présent règlement entrera en vigueur le 1<sup>er</sup> octobre 1958.*

*Toutefois, les dispositions des articles 43 et 44 entreront en vigueur le vingtième jour suivant la publication du présent règlement.*

Le présent règlement est obligatoire dans tous ses éléments et directement applicable dans tout État membre.

greatest amount which would have been due to a worker from one of these States if he had spent all his working life there;

Whereas, in order to secure mobility of labour under improved conditions, it is necessary heretofore to ensure closer co-ordination between the unemployment insurance schemes and the unemployment assistance schemes of all the Member States; whereas it is therefore particularly appropriate, in order to facilitate search for employment in the various Member States, to grant to an unemployed worker, for a limited period, the unemployment benefits provided for by the legislation of the Member State to which he was last subject;

Whereas it seems desirable to improve the system under Regulation No 3 governing family benefits in cases of separated families, both as regards the categories of persons to be entitled to such benefits and as regards the machinery for awarding them;

Whereas, taking into account the problems relating to unemployment, it is appropriate to extend entitlement to family benefits to members of the families of unemployed workers residing in a Member State other than the one which is responsible for payment of the unemployment benefit;

## TITLE I

### GENERAL PROVISIONS

#### Article 1

##### Definitions

For the purpose of this Regulation:

(a) 'worker' means:

- (i) subject to the restrictions set out in Annex V, any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed persons;
- (ii) any person who is compulsorily insured for one or more of the contingencies covered by the branches of social security dealt with in this Regulation, under a social security scheme for all residents or for the whole working population of such person:

— can be identified as an employed person by virtue of the manner in which such scheme is administered or financed, or

Whereas, moreover, the current restrictions on the granting of family benefits should be abolished, and whereas in order to ensure payment of benefits for the maintenance of the members of separated families, leaving aside those benefits aimed largely at encouraging an increase in population, it would be preferable to lay down rules common to all the Member States and efforts should continue to this end; but in the face of great variations between national legislations a solution should be adopted to take this situation into account: payment of family benefits of the country of employment in respect of five countries, and payment of family allowances of the country of residence of members of the family where the country of employment is France;

Whereas by analogy with the solutions contained in Council Regulation (EEC) 1612/68<sup>1</sup> of 15 October 1968 on freedom of movement for workers within the Community, it is desirable to bring together in an Advisory Committee representatives of workers and employers to examine the problems dealt with by the Administrative Commission;

Whereas the present Regulation may replace the arrangements provided for in Article 69 (4) of the Treaty establishing the European Coal and Steel Community;

#### HAS ADOPTED THIS REGULATION:

— failing such criteria, is insured for some other contingency specified in Annex V under a scheme for employed persons, either compulsorily or on an optional continued basis;

- (iii) any person who is voluntarily insured for one or more of the contingencies covered by the branches dealt with in this Regulation, under a social security scheme of a Member State for employed persons or for all residents or for certain categories of residents if such person has previously been compulsorily insured for the same contingency under a scheme for employed persons of the same Member State;
- (b) 'frontier worker' means any worker employed in the territory of a Member State and residing in the territory of another Member State to which he returns as a rule daily or at least once a week;

<sup>1</sup> O J No 259, 19.10.1968, p. 2.

however, a frontier worker who is posted elsewhere in the territory of the same or another Member State by the undertaking to which he is normally attached and is prevented on account of such posting from returning daily or at least once a week to the place where he resides shall nevertheless retain the status of frontier worker for a period not exceeding four months;

- (c) 'seasonal worker' means any worker who goes to the territory of a Member State other than the one in which he is resident to do work there of a seasonal nature for an undertaking or an employer of that State for a period which may on no account exceed eight months, and who stays in the territory of the said State for the duration of his work; work of a seasonal nature shall be taken to mean work which, being dependent on the succession of the seasons, automatically recurs each year;
- (d) 'refugee' shall have the meaning assigned to it in Article 1 of the Convention on the Status of Refugees, signed at Geneva on 28 July 1951;
- (e) 'stateless person' shall have the meaning assigned to it in Article 1 of the Convention on the Status of Stateless Persons, signed in New York on 28 September 1954;
- (f) 'member of the family' means any person defined or recognised as a member of the family or designated as a member of the household by the legislation under which benefits are provided or, in the cases referred to in Article 22 (1) (a) and Article 39, by the legislation of the Member State in whose territory such person resides; where, however, the said legislations regard as a member of the family or a member of the household only a person living under the same roof as the worker, this condition shall be considered satisfied if the person in question is mainly dependent on that worker;
- (g) 'survivor' means any person defined or recognised as such by the legislation under which the benefits are granted; where, however, the said legislation regards as a survivor only a person who was living under the same roof as the deceased worker, this condition shall be considered satisfied if such person was mainly dependent on the deceased worker;
- (h) 'residence' means habitual residence;
- (i) 'stay' means temporary residence;
- (j) 'legislation' means all the laws, regulations, and other provisions and all other present or future implementing measures of each Member State relating to the branches and schemes of social security covered by Article 4 (1) and (2);

This term excludes provisions of existing or future industrial agreements, whether or not they

have been the subject of a decision by the authorities rendering them compulsory or extending their scope. However, where such industrial agreements serve to implement an insurance requirement under the laws or regulations referred to in the preceding subparagraph, this restriction may at any time be lifted by a declaration by the Member State concerned, specifying the schemes of such a kind to which this Regulation applies. Notification shall be given of such declaration, which shall be published in accordance with the provisions of Article 96. The provisions of the preceding subparagraph shall not have the effect of exempting from application of this Regulation the schemes to which Regulation No 3 has been applied;

- (k) 'social security convention' means any bilateral or multilateral instrument which binds or will bind two or more Member States exclusively, and any other multilateral instrument which binds or will bind at least two Member States and one or more other States in the field of social security, for all or part of the branches and schemes set out in Article 4 (1) and (2), together with agreements, of whatever kind, concluded pursuant to the said instruments;
- (l) 'competent authority' means, in respect of each Member State, the Minister, Ministers or other equivalent authority responsible for social security schemes throughout or in any part of the territory of the State in question;
- (m) 'Administrative Commission' means the Commission referred to in Article 80;
- (n) 'institution' means, in respect of each Member State, the body or authority responsible for administering all or part of the legislation;
- (o) 'competent institution' means:

- (i) the institution with which the person concerned is insured at the time of the application for benefit; or
- (ii) the institution from which the person concerned is entitled or would be entitled to benefits if he or a member or members of his family were resident in the territory of the Member State in which the institution is situated; or
- (iii) the institution designated by the competent authority of the Member State concerned; or
- (iv) in the case of a scheme relating to an employer's liability in respect of the benefits set out in Article 4 (1), either the employer or the insurer involved or, in default thereof, a body or authority designated by the competent authority of the Member State concerned;



(p) 'institution of the place of residence' and 'institution of the place of stay' mean respectively the institution which is competent to provide benefits in the place where the person concerned resides and the institution which is competent to provide benefits in the place where the person concerned is staying, under the legislation administered by that institution or, where no such institution exists, the institution designated by the competent authority of the Member State in question;

(q) 'competent State' means the Member State in whose territory the competent institution is situated;

(r) 'insurance periods' means contribution periods or periods of employment as defined or recognised as insurance periods by the legislation under which they were completed or considered as completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to insurance periods;

(s) 'periods of employment' means periods defined or recognised as such by the legislation under which they were completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of employment;

(t) 'benefits' and 'pensions' mean all benefits and pensions, including all elements thereof payable out of public funds, revaluation increases and supplementary allowances, subject to the provisions of Title III, as also lump-sum benefits which may be paid in lieu of pensions, and payments made by way of reimbursement of contributions;

(u) (i) 'family benefits' means all benefits in kind or in cash intended to meet family expenses under the legislation provided for in Article 4 (1) (b), excluding the special childbirth allowances mentioned in Annex I;

(ii) 'family allowances' means periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family;

(v) 'death grants' means any once-for-all payment in the event of death, exclusive of the lump-sum benefits referred to in subparagraph (i).

## Article 2

### Persons covered

1. This Regulation shall apply to workers who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the

Member States, as also to the members of their families and their survivors.

2. In addition, this Regulation shall apply to the survivors of workers who have been subject to the legislation of one or more Member States, irrespective of the nationality of such workers, where their survivors are nationals of one of the Member States, or stateless persons or refugees residing within the territory of one of the Member States.

3. This Regulation shall apply to civil servants and to persons who, in accordance with the legislation applicable, are treated as such, where they are or have been subject to the legislation of a Member State to which this Regulation applies.

## Article 3

### Equality of treatment

1. Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.

2. The provisions of paragraph 1 shall apply to the right to elect members of the organs of social security institutions or to participate in their nomination, but shall not affect the legislative provisions of any Member State relating to eligibility or methods of nomination.

3. Save as provided in Annex II, social security conventions which remain in force pursuant to Article 7 (2) (c) and conventions concluded pursuant to Article 8 (1), shall apply to all persons to whom this Regulation applies.

## Article 4

### Matters covered

1. This Regulation shall apply to all legislation concerning the following branches of social security:

- sickness and maternity benefits;
- invalidity benefits, including those intended for the maintenance or improvement of earning capacity;
- old-age benefits;
- survivors' benefits;
- benefits in respect of accidents at work and occupational diseases;
- death grants;
- unemployment benefits;
- family benefits.

2. This Regulation shall apply to all general and special social security schemes, whether contributory or non-contributory, and to schemes concerning the liability of an employer or ship owner in respect of the benefits referred to in paragraph 1.

3. The provisions of Title III of this Regulation shall not, however, affect the legislative provisions of any Member State concerning a ship owner's liability.

4. This Regulation shall not apply to social and medical assistance, to benefit schemes for victims of war or its consequences, or to special schemes for civil servants and persons treated as such.

## Article 5

### Declarations of Member States on the scope of this Regulation

The Member States shall specify the legislation and schemes referred to in Article 4 (1) and (2), the minimum benefits referred to in Article 50 and the benefits referred to in Articles 77 and 78 in declarations, to be notified and published in accordance with Article 96.

## Article 6

### Social security conventions replaced by this Regulation

Subject to the provisions of Articles 7, 8 and 46 (4) this Regulation shall, as regards persons and matters which it covers, replace the provisions of any social security convention binding either:

- two or more Member States exclusively, or
- at least two Member States and one or more other States, where settlement of the cases concerned does not involve any institution of one of the latter States.

## Article 7

### International provisions not affected by this Regulation

1. This Regulation shall not affect obligations arising from:

- any convention adopted by the International Labour Conference which, after ratification by one or more Member States, has entered into force;
- the European Interim Agreements on Social Security of 11 December 1953 concluded between the Member States of the Council of Europe.

2. The provisions of Article 6 notwithstanding, the following shall continue to apply:

- the Agreement of 27 July 1950 concerning social security for Rhine boatmen, revised on 13 February 1961;
- the European Convention of 9 July 1956 concerning social security for workers in international transport;
- the social security conventions listed in Annex II.

## Article 8

### Conclusion of conventions between Member States

1. Two or more Member States may, as need arises, conclude conventions with each other based on the principles and in the spirit of this Regulation.

2. Each Member State shall notify, in accordance with Article 96 (1), any convention concluded with another Member State pursuant to paragraph 1.

## Article 9

### Admission to voluntary or optional continued insurance

1. The legislative provisions of any Member State which make admission to voluntary or optional continued insurance conditional upon residence in the territory of that State shall not apply to workers to whom this Regulation applies and who are resident in the territory of another Member State, provided that at some time in their past working life they were subject to the legislation of the first State.

2. Where, under the legislation of a Member State, admission to voluntary or optional continued insurance is conditional upon completion of insurance periods, any such periods completed under the legislation of another Member State shall be taken into account, to the extent required, as if they were completed under the legislation of the first State.

## Article 10

### Waiving of residence clauses — Effect of compulsory insurance on reimbursement of contributions

1. Save as otherwise provided in this Regulation, invalidity, old-age or survivors' cash benefits, pensions for accidents at work or occupational diseases and death grants acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated.

The preceding subparagraph shall also apply to lump-sum benefits granted in cases of remarriage of a surviving spouse who was entitled to a survivor's pension.

2. Where under the legislation of a Member State reimbursement of contributions is conditional upon the person concerned having ceased to be subject to compulsory insurance, this condition shall not be considered satisfied as long as the person concerned is subject to compulsory insurance as a worker under the legislation of another Member State.

#### Article 11

##### Revalorisation of benefits

Rules for revalorisation provided by the legislation of a Member State shall apply to benefits due under that legislation by virtue of the provisions of this Regulation.

#### Article 12

##### Prevention of overlapping of benefits

1. This Regulation can neither confer nor maintain the right to several benefits of the same kind for one and the same period of compulsory insurance. However, this provision shall not apply to benefits in respect of invalidity, old age, death (pensions) or occupational disease which are awarded by the

institutions of two or more Member States, in accordance with Article 41, Article 43 (2) and (3), Articles 46, 50 and 51 or Article 60 (1) (b).

2. The legislative provisions of a Member State for reduction, suspension or withdrawal of benefit in cases of overlapping with other social security benefits or other income may be invoked even though the right to such benefits was acquired under the legislation of another Member State or such income arises in the territory of another Member State. However, this provision shall not apply when the person concerned receives benefits of the same kind in respect of invalidity, old age, death (pensions) or occupational disease which are awarded by the institutions of two or more Member States in accordance with Articles 46, 50, 51 or Article 60 (1) (b).

3. The legislative provisions of a Member State for reduction, suspension or withdrawal of benefit in the case of a person in receipt of invalidity benefits or anticipatory old-age benefits pursuing a professional or trade activity may be invoked against such person even though he is pursuing his activity in the territory of another Member State.

4. An invalidity pension payable under Netherlands legislation shall, in a case where the Netherlands institution is bound under Article 57 (3) (c) or Article 60 (2) (a) to contribute also to the cost of benefits for occupational disease granted under the legislation of another Member State, be reduced by the amount payable to the institution of the other Member State which is responsible for granting the benefits for occupational disease.

## TITLE II

### DETERMINATION OF THE LEGISLATION APPLICABLE

#### Article 13

##### General rules

1. A worker to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to the provisions of Articles 14 to 17:

(a) a worker employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of

another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

(b) a worker employed on board a vessel flying the flag of a Member State shall be subject to the legislation of that State;

(c) civil servants and persons treated as such shall be subject to the legislation of the Member State in which the administration employing them is subject;

(d) a worker called up or recalled for service in the armed forces of a Member State shall retain the status of worker, and shall be subject to the legislation of that State; if entitlement under that legislation is subject to the completion of insurance periods before entry into or release from such service, insurance periods completed under the legislation of any other Member State shall be taken into account, to the extent necessary, as if they were insurance periods completed under the legislation of the first State.

#### Article 14

##### Special rules

1. Article 13 (2) (a) shall apply subject to the following exceptions or circumstances:

(a) (i) A worker employed in the territory of a Member State by an undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of that work does not exceed twelve months and that he is not sent to replace another worker who has completed his term of posting;

(ii) if the duration of the work to be done extends beyond the duration originally anticipated, owing to unforeseeable circumstances, and exceeds twelve months, the legislation of the first State shall continue to apply until the completion of such work, provided that the competent authority of the State in whose territory the worker is posted or the body designated by that authority gives its consent; such consent must be requested before the end of the initial twelve month period. Such consent cannot, however, be given for a period exceeding twelve months;

(b) a worker employed in international transport in the territory of two or more Member States as a member of travelling or flying personnel and who is working for an undertaking which, for hire or reward or on own account, operates transport services for passengers or goods by rail, road, air or inland waterway and has its registered office or place of business in the territory of a Member State, shall be subject to the legislation of the latter State, with the following restrictions:

(i) where the said undertaking has a branch or permanent representation in the territory of a

Member State other than that in which it has its registered office or place of business, a worker employed by such branch or agency shall be subject to the legislation of the Member State in whose territory such branch or permanent representation is situated;

(ii) where a worker is employed principally in the territory of the Member State in which he resides, he shall be subject to the legislation of that State, even if the undertaking which employs him has no registered office or place of business or branch or permanent representation in that territory;

(c) a worker, other than one employed in international transport, who normally pursues his activity in the territory of two or more Member States shall be subject:

(i) to the legislation of the Member State in whose territory he resides, if he pursues his activity partly in that territory or if he is attached to several undertakings or several employers who have their registered offices or places of business in the territory of different Member States;

(ii) to the legislation of the Member State in whose territory is situated the registered office or place of business of the undertaking or individual employing him, if he does not reside in the territory of any of the Member States where he is pursuing his activity;

(d) a worker who is employed in the territory of one Member State by an undertaking which has its registered office or place of business in the territory of another Member State and which straddles the common frontier of these States shall be subject to the legislation of the Member State in whose territory the undertaking has its registered office or place of business.

2. Article 13 (2) (b) shall apply subject to the following exceptions and circumstances:

(a) a worker employed by an undertaking to which he is normally attached, either in the territory of a Member State or on board a vessel flying the flag of a Member State, who is posted by that undertaking on board a vessel flying the flag of another Member State to perform work there for that undertaking shall, subject to the conditions provided in paragraph 1 (a), continue to be



concerned for entitlement to old age benefits, by substituting for the theoretical amount referred to in Article 46 (2) (a) the amount of the invalidity benefits due from the said institution.

#### CHAPTER 3

#### OLD AGE AND DEATH (PENSIONS)

##### Article 44

General provisions for the award of benefits when a worker has been subject to the legislation of two or more Member States

1. The rights to benefits of a worker who has been subject to the legislation of two or more Member States, or of his survivor, shall be determined in accordance with the provisions of this Chapter.

2. Subject to the provisions of Article 49, when a claim for the award of a benefit is lodged, such award must be made having regard to all the legislations to which the worker has been subject. Exception shall be made to this rule if the person concerned expressly asks for postponement of the award of old age benefits to which he would be entitled under the legislation of one or more Member States, provided that the periods completed under that legislation or those legislations are not taken into account for the purpose of acquiring the right to benefit in another Member State.

3. This Chapter shall not apply to increases, in or supplements to pensions in respect of children, or to orphans' pensions granted pursuant to Chapter 8.

##### Article 45

Consideration of insurance periods completed under the legislations to which a worker has been subject for the acquisition, retention or recovery of the right to benefits

1. An institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits conditional upon the completion of an insurance period shall take into account, to the extent necessary, insurance periods completed under the legislation of any Member State as though they had been completed under the legislation which it administers.

2. Where the legislation of a Member State makes the granting of certain benefits conditional upon the insurance periods having been completed in an occupation subject to a special scheme or, where appropriate, in a specific employment, periods completed under the legislations of other Member

States shall be taken into account for the granting of such benefits only if completed under such a scheme or, failing this, in the same occupation or, where appropriate, in the same employment. If, taking into account periods thus completed, the person concerned does not satisfy the conditions for receipt of these benefits, those periods shall be taken into account for the granting of benefits under the general scheme or, failing this, under the scheme applicable to manual or clerical workers, as appropriate.

3. Where the legislation of a Member State which makes the granting of benefits conditional upon a worker being subject to its legislation at the time when the risk materialises has no requirements as to the length of insurance periods either for entitlement to or calculation of benefits, any worker who is no longer subject to that legislation shall for the purposes of this Chapter, be deemed to be still so subject at the time when the risk materialises, if at that time he is subject to the legislation of another Member State or, failing this, can establish a claim to benefits under the legislation of another Member State. However, this latter condition shall be deemed to be satisfied in the case referred to in Article 48 (1).

##### Article 46

##### Award of benefits

1. Where a worker has been subject to the legislation of a Member State and where he satisfies its conditions for entitlement to benefits, without application of the provisions of Article 45 being necessary, the competent institution of that Member State shall, in accordance with the amount of benefit administered, determine the amount of benefit corresponding to the total length of the insurance periods to be taken into account in pursuance of such legislation.

This institution shall also calculate the amount of the benefit which would be obtained by applying the rules laid down in paragraph 2) (a) and (b). Only the higher of these two amounts shall be taken into consideration.

2. Where a worker has been subject to the legislation of any Member State and does not satisfy the conditions for entitlement to benefits unless the account is taken of the provisions of Article 45, the competent institution of that Member State shall apply the following rules:

(a) the institution shall calculate the theoretical amount of benefit that the person concerned could claim if all the insurance periods completed under the legislations of the Member States to which he has been subject had been completed in the State in question and under the legislation administered by it on the date the benefit is

awarded. If, under that legislation, the amount of the benefit does not depend on the length of the insurance periods, then that amount shall be taken as the theoretical amount referred to in this subparagraph;

(b) the institution shall then establish the actual amount of the benefit on the basis of the theoretical amount referred to in the preceding subparagraph and in the ratio which the length of the insurance periods completed before the materialisation of the risk under the legislation administered by that institution, bears to the total length of the insurance periods completed before materialisation of the risk under the legislations of all the Member States concerned;

(c) if the total length of the insurance periods completed under the legislations of all the Member States concerned before the materialisation of the risk is longer than the maximum period required by the legislation of one of these States for receipt of full benefit, the competent institution of that State shall, when applying the provisions of this paragraph, take into consideration this maximum period instead of the total length of the periods completed; this method of calculation must not result in the imposition on that institution of the costs of a benefit greater than the full benefit provided for by the legislation which it administers;

(d) the procedure for taking into account duplicate periods when applying the rules of calculation laid down in this paragraph, shall be laid down in the implementing Regulation referred to in Article 97.

3. The person concerned shall be entitled to the total sum of the benefits calculated in accordance with the provisions of paragraphs 1 and 2, within the limit of the highest theoretical amount of benefits calculated according to paragraph 2 (a).

Where the amount referred to in the preceding subparagraph is exceeded, any institution applying paragraph 1 shall adjust its benefit by an amount corresponding to the proportion which the amount of the benefit concerned bears to the total of the benefits determined in accordance with paragraph 1.

4. When in a case of invalidity, old age or survivors' pensions, the total of the benefits due from two or more Member States, under the provisions of a multilateral social security convention referred to in Article 6 (b), is lower than the total which would be due from such Member States under paragraphs 1 and 3, the person concerned shall benefit from the provisions of this Chapter.

##### Article 47

##### Additional provisions for the calculation of benefits

1. For the calculation of the theoretical amount referred to in Article 46 (2) (a), the following rules shall apply:

(a) where, under the legislation of a Member State, benefits are calculated on the basis of an average wage or salary, an average contribution, an average increase or on the ratio which existed, during the insurance periods, between the claimant's gross wage or salary and the average gross wage or salary of all insured persons other than apprentices, such average figures or ratios shall be determined by the competent institution of that State solely on the basis of the insurance periods completed under the legislation of the said State, or the gross wage or salary received by the person concerned during those periods only;

(b) where, under the legislation of a Member State, benefits are calculated on the basis of the amount of wages or salaries, contributions or increases, the competent institution shall determine the wages or salaries, contributions and increases to be taken into account in respect of insurance periods completed under the legislations of other Member States on the basis of the average wages or salaries, contributions or increases recorded in respect of the insurance periods completed under the legislation which it administers;

(c) where, under the legislation of a Member State, benefits are calculated on the basis of a standard wage or salary or a fixed amount, the competent institution shall consider the wage or salary or fixed amount to be taken into account by it in respect of insurance periods completed under the legislations of other Member States as being equal to the standard wage or salary or fixed amount or, where appropriate, to the average of the standard wages or salaries or fixed amounts corresponding to the insurance periods completed under the legislation which it administers;

(d) where, under the legislation of a Member State, benefits are calculated for some periods on the basis of the amount of wages or salaries and, for other periods, on the basis of a standard wage or salary or a fixed amount, the competent institution shall, in respect of insurance periods completed under the legislations of other Member States, take into account the wages or salaries or fixed amounts determined in accordance with the provisions of (b) or (c) or, as appropriate, the average of these wages or salaries or amounts, where benefits are calculated on the basis of a standard wage or salary or a fixed amount for all the periods completed under the legislation which it administers, the

competent institution shall consider the wage or salary to be taken into account in respect of the insurance periods completed under the legislations of other Member States as being equal to the notional wage or salary corresponding to that standard wage or salary or fixed amount.

2. The legislative provisions of a Member State concerning the recalculation of the factors taken into account for the calculation of benefits shall apply, as appropriate, to the factors to be taken into account by the competent institution of that State, in accordance with the provisions of paragraph 1, in respect of the insurance periods completed under the legislations of other Member States.

3. If, under the legislation of a Member State, the amount of benefits is determined taking into account the existence of members of the family other than children, the competent institution of that State shall also take into consideration the members of the family of the person concerned who are residing in the territory of the competent State.

#### Article 48

Insurance periods of less than one year

1. Notwithstanding the provisions of Article 46 (2), if the total length of the insurance periods completed under the legislation of a Member State does not amount to one year, and if under that legislation no right to benefits is acquired by virtue only of those periods the institution of that State shall not be bound to award benefits in respect of such periods.

2. The competent institution of each of the other Member States concerned shall take into account the periods referred to in paragraph 1, for the purposes of applying the provisions of Article 46 (2) excepting those of subparagraph (b).

3. If the effect of applying the provisions of paragraph 1 would be to relieve them of their obligations all the institutions of the States concerned, benefits shall be awarded exclusively under the legislation of the last of those States whose conditions are satisfied, as if all the insurance periods completed and taken into account in accordance with Article 45 (1) and (2) had been completed under the legislation of that State.

#### Article 49

Calculation of benefits when the person concerned does not simultaneously satisfy the conditions laid down by all the legislations under which insurance periods have been completed

1. If, at a given time, the person concerned does not satisfy the conditions laid down for the provision

of benefits by all the legislations of the Member States to which he has been subject, taking into account where appropriate the provisions of Article 45, but satisfies the conditions of one or more of them only, the following provisions shall apply:

(a) each of the competent institutions administering a legislation whose conditions are satisfied shall calculate the amount of the benefit due, in accordance with the provisions of Article 46;

(b) however:

(i) if the person concerned satisfies the conditions of at least two legislations without having recourse to insurance periods completed under the legislations whose conditions are not satisfied, these periods shall not be taken into account for the purposes of Article 46 (2);

(ii) if the person concerned satisfies the conditions of one legislation only without having recourse to insurance periods completed under the legislations whose conditions are not satisfied, the amount of the benefit due shall be calculated only in accordance with the provisions of the legislation whose conditions are satisfied, taking account of the periods completed under that legislation only.

2. The benefit or benefits awarded under one or more of the legislations in question, in the case referred to in paragraph 1, shall be recalculated automatically in accordance with Article 46, as and when the conditions required by one or more of the other legislations to which the person concerned had been subject are satisfied, taking into account as appropriate the provisions of Article 45.

3. A recalculation shall automatically be made in accordance with paragraph 1, and without prejudice to Article 40 (2), when the conditions required by one or more of the legislations concerned are no longer satisfied.

#### Article 50

Award of a supplement when the total of benefits due under the legislations of the various Member States does not amount to the minimum laid down by the legislation of the State in whose territory the recipient resides

A recipient of benefits to whom this Chapter applies may not, in the State in whose territory he resides and under whose legislation a benefit is due to him, be awarded a benefit which is less than the minimum benefit fixed by that legislation for an insurance period equal to all the insurance periods taken into account for the payment in accordance with the

preceding Articles. The competent institution of that State shall, if necessary, pay him throughout the period of his residence in its territory a supplement equal to the difference between the total of the benefits due under this Chapter and the amount of the minimum benefit.

#### Article 51

Recalculation and recalculation of benefits

1. If, by reason of an increase in the cost of living or changes in the level of wages or salaries or other reasons for adjustment, the benefits of the States concerned are altered by a fixed percentage, or amount, such percentage or amount must be applied directly to the benefits determined under Article 46, without the need for a recalculation in accordance with the provisions of that Article.

2. On the other hand, if the method of determining, or the rules for calculating, benefits should be altered, a recalculation shall be carried out in accordance with Article 46.

#### CHAPTER 4

### ACCIDENTS AT WORK AND OCCUPATIONAL DISEASES

#### Section 1

#### Right to benefits

#### Article 52

Residence in a Member State other than the competent State — General Rules

A worker who sustains an accident at work or contracts an occupational disease, and who is residing in the territory of a Member State other than the competent State, shall receive in the State in which he is residing:

(a) benefits in kind, provided on behalf of the competent institution by the institution of his place of residence in accordance with the legislation which it administers as if he were insured with it;

(b) cash benefits provided by the competent institution in accordance with the legislation which it administers. However, by agreement between the competent institution and the institution of the place of residence, these benefits may be provided by the latter institution on behalf of the former in accordance with the legislation of the competent State.

#### Article 53

Frontier workers — Special rule

A frontier worker may also obtain benefits in the territory of the competent State. Such benefits shall be provided by the competent institution in accordance with the legislation of that State, as if the worker were residing there.

#### Article 54

Stay in or transfer of residence to the competent State

1. A worker covered by Article 52 who is staying in the territory of the competent State shall receive benefits in accordance with the legislation of that State, even if he has already received benefits before his stay. This provision shall not, however, apply to frontier workers.

2. A worker covered by Article 52 who transfers his place of residence to the territory of the competent State shall receive benefits in accordance with the legislation of that State, even if he has already received benefits before transferring his residence.

#### Article 55

Stay outside the competent State — Return to or transfer of residence to another Member State after sustaining an accident or contracting an occupational disease — Need to go to another Member State in order to receive appropriate treatment

1. A worker who sustains an accident at work or contracts an occupational disease and:

(a) who is staying in the territory of a Member State other than the competent State; or

(b) who, after having become entitled to benefits at the expense of the competent institution, is authorised by that institution to return to the territory of the Member State where he is resident, or to transfer his place of residence to the territory of another Member State; or

(c) who is authorised by the competent institution to go to the territory of another Member State in order to receive there the treatment appropriate to his condition,

shall be entitled:

(i) to benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence in accordance with the legislation administered by that institution as though he were insured with it, the period during which benefits are



**CHAPTER 6**

**TABLES**

**TABLE 1**

Zahl der Einwanderer (travailleurs permanents)  
nach Jahr und Nationalitäten in Frankreich

Jahr	Spanier	Italiener	Marokkaner	Portugiesen	Tunesier	Jugoslawen	Insgesamt
1946	-	27 831	1 439	-	-	-	30 171
1949	-	36 889	-	-	-	-	58 782
1950	650	6 083	-	72	-	-	10 925
1951	804	15 919	1 308	260	-	-	20 996
1955	2 204	14 246	-	949	-	-	19 029
1956	8 823	52 782	-	1 432	-	-	65 428
1957	23 096	80 385	-	4 160	-	-	111 693
1961	39 623	23 808	3 924	6 716	-	-	78 927
1962	63 535	21 516	8 626	12 916	-	490	113 069
1964	66 269	11 393	17 502	43 751	2 730	3 947	153 731
1965	49 865	18 043	15 494	47 330	5 776	6 656	152 063
1966	33 448	13 379	14 331	44 916	6 631	10 035	131 725
1969	23 847	6 498	19 335	80 829	14 925	11 270	167 802
Insges.	475 580	576 980	123 872	347 513	42 705	52 066	1 792 038

Source: Nikolinakos (1973), p.31.

**TABLE 2**

IMMIGRANTS IN FRANCE, GERMANY, SWITZERLAND, AND  
BRITAIN BY COUNTRY OF ORIGIN (THOUSANDS)

Country of Origin	France	Germany	Switzerland	Britain	Total
Irish Republic	1			730	740
Poland	113			118	231
Germany	43		116	142	301
France		47	50	34	131
Austria	3	143	43	30	219
Netherlands	10	104		17	131
Portugal	480	54		6	540
Spain	617	246	98	35	996
Italy	612	574	532	102	1,820
Yugoslavia	52	515	21	13	601
Greece	10	343		9	362
Turkey	9	469		4	482
Cyprus				60	60
Tunisia	89				89
Morocco	143				143
Algeria	608				608
Pakistan				75	75
India	1			240	241
Other British Areas				152	152
Others	380	402	112	710	1,690
Total	3,177	2,977	972	2,603	9,729

Note: In the case of Britain, the figures are for persons with birthplaces outside the United Kingdom. In the other countries, the figures are for persons of foreign nationalities.

Source: Castles and Kosack (1973), p.5.



TABLE 3

Zahlenmaterial zur Beschäftigung ausländischer Arbeiter in der BRD. Von den insgesamt im September 1971 in der BRD beschäftigten ausländischen Arbeitnehmern waren 1,852,100 von 2,239,300 aus Italien, Griechenland, Spanien, Portugal, Jugoslawien und der Türkei (82.7%). Dazu kamen 12,000 Arbeiter aus Marokko, 10,200 aus Tunesien, rund 93,000 kamen aus Österreich, 44,000 aus Frankreich, 64,000 aus Holland, 17,000 aus Grossbritannien, 9,000 aus Belgien und 8,000 aus der Schweiz.

Zunahme der beschäftigten ausländischen Arbeitnehmer in der BRD seit 1954.

	Insgesamt	Italien	Griechenl	Spanien	Türkei	Portugal	Jugoslaw	Insg. GA	A. Quote
Jul 54	72,906	6,509	548	411	-	-	1,801	9,269	0.4
Jul 55	79,607	7,461	637	486	-	-	2,085	10,669	0.4
Jul 56	98,818	18,597	953	698	-	-	2,297	22,545	0.5
Jul 57	108,190	19,096	1,822	967	-	-	2,778	24,663	0.6
Jul 58	127,083	25,609	2,838	1,494	-	-	4,846	34,787	0.6
Jul 59	166,829	48,809	4,089	2,150	-	-	7,310	62,358	0.8
Sep 60	329,356	144,176	20,782	16,459	2,495	261	8,826	192,999	1.5
Sep 61	548,916	224,579	52,284	61,819	-	-	-	-	2.5
Sep 62	711,459	276,761	80,719	94,049	18,558	1,421	23,608	495,116	3.2
Sep 63	828,743	286,968	116,855	119,559	32,962	2,284	44,428	602,856	3.7
Sep 64	985,616	296,104	154,832	151,073	85,172	4,636	53,057	744,874	4.4
Sep 65	1,216,804	372,297	187,160	182,754	132,777	14,014	64,060	953,062	5.7
Sep 66	1,313,491	391,291	194,615	178,154	160,950	21,091	96,675	1,042,776	6.1
Sep 67	991,255	266,801	140,306	118,028	131,309	17,803	95,730	769,877	4.7
Sep 68	1,089,873	303,966	144,740	115,864	152,905	19,980	119,144	856,599	5.2
Sep 69	1,501,409	348,977	191,210	143,058	244,335	29,534	265,036	1,222,150	7.0
Sep 70	1,948,951	381,840	242,184	171,691	353,898	44,796	424,546	1,618,955	9.1
Sep 71	2,239,300	407,900	268,500	186,500	452,700	58,300	478,200	1,852,100	10.3

(A Quote - Ausländerquote; Anteil der beschäftigten ausländischen Arbeitnehmer an der Gesamtzahl der beschäftigten Arbeitnehmer in der BRD)

Source: Gieselberger (1973), p.16.

TABLE 4

Number of newly entering foreign workers (first row), the proportion of recruited new entrants (in brackets), and number of employed foreign workers at mid-year (second row), in the Federal Republic of Germany, by nationality, in thousands.

	1958 <sup>a</sup>	1959	1960	1961	1962	1963	1964	1965	1966	1967	1968 <sup>b</sup>	1969 <sup>b</sup>	1970 <sup>b</sup>
Belgium	0.5 7.0	0.7 7.3	2.1 7.7	3.6 4.9	3.6 6.4	2.7 6.7	2.9 6.7	3.6 6.6	2.9 7.3	2.0 7.2	0.8 6.2	0.9 7.1	2.0 <sup>c</sup> 6.7
France	1.2 3.9	2.6 6.8	6.5 9.3	10.8 14.5	10.2 19.4	9.8 20.1	17.9 21.1	15.6 25.4	13.2 29.3	7.8 23.5	5.1 24.2	6.2 26.7	8.0 <sup>c</sup> 36.2
Italy (\$ recr.)	19.5 (50) 25.6	42.5 (59) 48.9	141.3 (66) 121.7	165.8 (65) 207.7	165.3 (46) 266.0	134.9 (24) 270.2	142.1 (19) 269.3	204.3 (13) 354.8	165.5 (9) 399.2	58.5 (7) 274.3	130.2 (8) 287.4	136.2 (9) 340.2	168.3 <sup>c</sup> (4) 375.0
Luxbo.	0.06 0.5	0.06 0.6	0.2 0.5	0.1 0.7	0.2 0.8	0.2 0.9	0.2 1.0	0.2 1.0	0.2 1.0	0.1 0.9	0.2 0.9	0.2 1.1	0.3 <sup>c</sup> 1.2
Netherlnd.	2.3 29.1	7.9 22.7	16.5 33.5	28.5 44.7	29.3 52.9	27.4 59.1	25.2 60.4	22.9 59.6	15.7 56.5	6.9 44.9	3.4 44.7	3.9 49.9	8.4 <sup>c</sup> 55.5
EEC	29.5 60.0	53.7 86.2	166.6 167.9	208.8 272.5	208.6 345.4	175.0 385.0	181.2 370.4	246.5 452.7	197.4 495.3	75.4 349.7	130.7 363.5	147.4 426.9	187.0 <sup>c</sup> 477.5
Greece (\$ recr.)	1.5 -	2.5 -	23.4 (41)	36.6 (58)	47.6 (67)	58.0 (70)	65.1 (62)	61.8 (54)	39.7 (68)	7.6 (26)	37.3 (65)	65.1 (79)	64.0 (78)
Turkey (\$ recr.)	- -	- -	- -	7.1 (31)	15.3 (72)	27.9 (84)	62.9 (87)	59.8 (76)	43.5 (75)	14.8 (49)	62.4 (67)	121.5 (61)	123.6 (77)
	-	-	2.5	5.2	15.3	27.1	69.2	121.1	158.0	137.1	139.3	213.0	328.0
Unid. Kingd.	1.1 2.0	1.5 2.6	2.1 3.2	2.6 4.1	3.0 5.1	3.7 6.1	3.6 6.7	4.5 7.6	4.7 8.8	3.7 8.6	4.1 9.1	4.8 10.9	5.9 13.3
Yugosl. (\$ recr.)	3.4 4.8	4.2 7.3	4.4 8.8	10.0 12.9	25.1 23.6	19.4 44.4	17.5 53.1	31.0 64.1	50.9 96.7	15.4 97.7	76.8 99.7	192.2 226.3	202.4 289.0
Spain (\$ recr.)	1.2 1.5	1.9 2.2	20.7 9.5	51.2 48.4	55.0 87.3	51.7 117.5	65.9 144.3	65.1 180.6	38.5 185.3	7.3 129.1	32.0 112.0	50.1 135.5	48.8 165.9
Portugal (\$ recr.)	- -	- -	- 0.3	0.9 0.7	1.0 1.4	1.5 2.2	3.9 3.5	11.1 10.5	9.2 19.8	1.8 18.5	6.7 18.7	13.2 25.4	20.1 40.2
Extra-Eur.	3.4 4.1	5.0 5.5	8.9 9.9	15.7 16.5	17.0 26.7	15.0 35.5	14.2 41.6	15.0 47.8	13.6 50.2	8.6 43.9	10.7 44.3	15.1 49.0	24.7 61.1
Other	14.5 51.9	15.5 55.9	27.4 64.3	27.6 106.3	24.0 81.6	25.3 87.2	28.0 92.2	30.1 99.3	27.2 103.7	16.8 92.3	21.2 92.0	36.7 103.8	37.4 134.5
OVERALL (\$ recr.)	54.6 (18) 127.1	85.3 (30) 165.8	259.5 (43) 279.4	360.5 (43) 507.4	395.5 (39) 655.5	377.5 (35) 811.2	442.3 (38) 932.9	524.9 (29) 1,164.4	424.8 (25) 1,314.0	151.9 (11) 1,023.7	330.9 (27) 1,014.0	646.1 (43) 1,372.1	713.9 (45) 1,838.9
\$ women	15%	15%	12%	15%	19%	22%	21%	25%	29%	35%	28%	25%	25%
	-	19%	15%	14%	18%	21%	22%	23%	25%	29%	30%	29%	29%
\$ emp'ees	0.6%	0.8%	1.3%	2.3%	3.0%	3.6%	4.1%	5.5%	6.1%	4.9%	4.9%	6.4%	6.5%

- = Not available or not applicable.

a = Excluding Saar.

b = New entrants excluding frontier workers (21,400 in 1968; 29,200 in 1969; 8,600 in 1970).

c = Estimated.

Source: Böning (1972), p.34.



TABLE 5

<u>Travailleurs étrangers</u>		Belg-	Alle-	France	Italie	Luxem-	Pays-	Total	Roy-	Irl-	Dane-
		ique	magne			bourg	Bas	6	aume-	ande	mark
Année									Uni		
1958	Travailleurs étrangers	-	0.7	-	-	-	1.0	-	-	-	-
1969	occup. en % des	6.6	6.4	7.6	0.3	29	2.8	5.2	4.5	0.4 <sup>(1)</sup>	1.2 <sup>(2)</sup>
1970	salariés occupés	6.7	8.3	7.5	0.3	30	2.9	5.8	5.0	0.3 <sup>(1)</sup>	1.3 <sup>(2)</sup>
1971		6.9	9.7	7.4	0.3	33	3.0	6.4	5.4	0.3 <sup>(1)</sup>	1.9 <sup>(2)</sup>
1972		7.2	10.5	7.3	0.4	34	3.0	6.7	5.5	0.3 <sup>(1)</sup>	-

(1) A l'exclusion du Royaume-Uni et du Commonwealth.

(2) A l'exclusion du marché nordique du travail.

Source: Exposé Social, 1973, p.234.

**TABLE 6**

**MIGRANT WORKERS' REMITTANCES HOME TO SELECTED  
MEDITERRANEAN COUNTRIES**

<i>Year</i>	<i>Remittances (millions of U.S.\$)</i>	<i>Percentage of Total Imports Offset by Remittances</i>	<i>Remittances as Percentage of National Income</i>
<i>Italy</i>			
1960	266.3	6.1	1.0
1961	315.6	6.8	1.1
1962	343.6	6.3	1.1
1963	321.0	4.7	0.9
1964	301.7	4.7	0.8
<i>Greece</i>			
1960	99.1	19.0	3.7
1961	107.2	18.3	3.4
1962	153.3	23.2	4.7
1963	141.5	18.9	3.9
1964	123.7	14.0	3.0
1965	134.6	13.1	n.a.
<i>Spain</i>			
1960	63.8	9.1	0.7
1961	119.3	11.4	1.2
1962	164.0	11.3	1.4
1963	272.0	15.1	2.0
1964	325.0	15.7	2.1

Source: Castles & Kosack (1973), p.417.



TABLE 7

Finanzielle Auswirkungen der zweiseitigen Abkommen über Sozialversicherung und der EWG-Verordnungen Nr. 3 und 4 über die soziale Sicherheit der Wanderarbeitnehmer im Jahre 1969 (Auszug Anwerbeländer, für Jugoslawien vom 1. 9. bis 31. 12. 1969)

1. Zeile: Rentenleistungen      Zahlungen der BRD in den Vertragsstaat  
2. Zeile:      Zahlungen der Vertragsstaaten an die BRD  
3. Zeile:      Nettoteilungen der BRD an die Vertragsstaaten  
4. Zeile: Krankenversicherung von ausl. Versicherungsträgern übersandte Kostenrechnungen

5. Zeile:      Zahlungen an ausl. Versicherungsträger - in den angegebenen Zahlen sind Erstattungen für Kostenrechnungen des Berichtsjahrs und für frühere Jahre enthalten  
6. Zeile:      an ausl. Versicherungsträger übersandte Kostenrechnungen  
7. Zeile:      Zahlungen der ausl. Versicherungsträger an die BRD  
8. Zeile:      Nettoteilungen der BRD an die Vertragsstaaten  
9. Zeile: Unfallversicherung      Renten-, Sach- u. Barleistungen bei Heilbehandlung - Leistungen der BRD an die Vertragsstaaten  
10. Zeile:      Leistungen der Vertragsstaaten an die BRD  
11. Zeile:      Nettoteilungen der BRD an die Vertragsstaaten  
12. Zeile: Sozialversicherung      Leistungen der BRD abzüglich der Zahlungen der Vertragsstaaten  
13. Zeile: Anzahl der in der BRD beschäftigten ausl. Arbeitnehmer im Juli 1969  
14. Zeile: Leistungen der BRD entsprechend den Abkommen pro in der BRD beschäftigten ausl. Arbeitnehmer

Italien	Griechenl.	Spanien	Portug.	Jugoslaw.	Turkei	Anw. L.	Insgesamt	Zeile
21 384 121	1 040 121	4 279 428	10 051	24 990	713 141	27 451 852	196 519 963	1 Betrag
40 807	458	1 316	6	10	411	—	161 268	Fälle
1 844 811	109 467	—	—	—	3 358	1 957 636	70 311 992	2
1 563	56	—	—	—	7	—	66 599	
19 539 310	930 654	4 279 428	10 051	24 990	709 783	25 494 216	126 205 971	3
56 766 139	694 045	6 841 019	273 793	—	—	—	76 645 765	4
253 361	9 539	69 901	6 779	—	—	—	459 929	
23 735 442	47 707	4 756 794	273 793	—	—	28 813 736	38 908 459	5
126 224	724	46 172	6 779	—	—	—	273 545	
361 369	74 894	61 966	59	—	—	—	5 344 597	6
1 826	352	269	1	—	—	—	31 784	
218 997	—	28 874	—	—	—	247 871	5 611 854	7
2 071	—	161	—	—	—	—	45 925	
23 516 445	47 707	4 727 920	273 793	—	—	28 565 865	33 286 605	8
11 353 871	2 147 129	2 780 398	—	—	2 572 405	18 653 803	29 827 196	9
4 602	671	—	—	—	613	—	661 871	
186 318	—	—	—	—	—	186 318	3 387 266	10
364	—	—	—	—	—	—	—	
10 967 533	2 147 129	2 780 398	—	—	2 572 405	18 467 465	26 439 930	11
54 013 288	3 125 490	11 797 746	283 844	24 990	3 282 188	72 557 516	185 932 506	12 Betrag
29,0	1,7	6,4	0,1	0,0	1,8	39,0	100,0	Proz.
374 981	229 379	165 854	40 222	388 953	327 985	1 527 274	1 791 569	13 Zahl
20,9	12,8	9,3	2,2	21,7	18,3	85,3	100,0	Proz.
144	137	71	71	0	100	48	104	14 Betrag

Source: Geiselberger (1973), pp. 104-5.

TABLE 8

Finanzielle Auswirkungen der zweiseitigen Abkommen über Sozialversicherung und der EWG-Verordnungen Nr. 3 und 4 über die Soziale Sicherheit der Wanderarbeitnehmer in den Jahren 1961-1970

Jahr	Rentenleistungen in der Rentenversiche- rung der Arbeiter		Rentenleistungen in der Rentenversiche- rung der Angestell- ten		Rentenleistungen in der Knappschaftli- chen Rentenversiche- rung		Rentenleistungen in der Rentenversiche- rung insgesamt		Sonstige Leistungen	
	Fälle	Betrag in DM	Fälle	Betrag in DM	Fälle	Betrag in DM	Fälle	Betrag in DM	Fälle	Betrag in DM
1961	56.128	39.801.425	7.738	14.871.929	15.842	22.794.177	79.708	77.467.532	-	-
1962	64.255	41.878.105	8.953	17.979.353	15.942	23.483.159	89.150	83.340.617	34.376	34.376
1963	70.318	45.163.709	11.036	24.338.881	17.376	24.105.684	98.730	93.608.274	96.779	96.779
1964	77.319	50.630.940	12.494	32.428.290	17.826	12.159.334	107.639	95.218.564	14.313	14.313
1965	85.169	58.765.630	12.709	34.892.959	19.340	13.145.038	117.218	106.803.627	42.884	42.884
1966	90.627	66.126.129	14.792	43.099.998	18.597	14.176.295	124.016	123.402.422	44.183	44.183
1967	100.505	81.336.792	16.345	56.467.064	18.895	16.417.350	135.745	154.221.205	16.043	16.043
1968	111.373	92.516.018	21.353	66.727.600	19.161	16.378.006	151.887	175.621.624	31.539	31.539
1969	121.499	106.679.169	20.153	72.886.083	19.616	16.954.711	161.268	196.519.963	43.414	43.414
1970	-	125.000.000	-	85.800.000	-	20.000.000	-	230.800.000	-	-

\* Durchschnittliche Zahl der Rentenberechtigten je Monat.

\* Zahl der Fälle noch nicht ermittelt; bei den Beträgen handelt es sich um vorläufige Schätzungen der Rentenversicherungsträger.



TABLE 9

## Finanzielle Auswirkungen der zweiseitigen Abkommen über Sozialversicherung und der EWG-Verordnungen

Nr. 3 und 4 über die Soziale Sicherheit der Wanderarbeitnehmer

im Jahre 1969

Rentenversicherungen - Zahlungen in den Vertragsstaat

Vertrags- staat	Rentenleistungen in der Rentenversicherung der Arbeitgeber				knappschaftlichen Rentenversicherung				Rentenversicherung insgesamt				Sonstige Leistungen	
	Fälle <sup>1)</sup>	Betrag in DM	Fälle <sup>1)</sup>	Betrag in DM	Fälle <sup>1)</sup>	Betrag in DM	Fälle <sup>1)</sup>	Betrag in DM	Fälle <sup>1)</sup>	Betrag in DM	Fälle <sup>1)</sup>	Betrag in DM	Betrag in DM	Betrag in DM
Belgien	16 889	14 518 591	873	2 433 556	1 913	2 624 372	19 675	19 626 519	-	-	-	-	-	-
Dänemark	192	496 695	564	2 118 625	5	15 410	761	2 630 730	-	-	-	-	-	-
Frankreich	7 709	7 830 337	1 658	5 666 263	7 735	6 066 224	17 102	19 562 824	41	41	-	-	-	-
Griechenland	417	939 871	-	-	41	100 250	458	1 040 121	-	-	-	-	-	-
Groß-														
britannien	1 239	4 517 013	3 618	19 350 336	481	197 130	5 338	24 064 479	-	-	-	-	-	-
Italien	37 986	18 832 148	721	2 250 185	2 100	301 788	40 807	21 384 121	6	6	-	-	-	-
Jugoslawien	1	1 990	-	-	9	23 000	10	24 990	-	-	-	-	-	-
Luxemburg	1 089	995 040	242	565 537	89	198 273	1 420	1 758 850	-	-	-	-	-	-
Niederlande	26 331	23 667 559	1 570	6 297 454	5 210	6 740 740	33 111	36 705 753	29 122	29 122	-	-	-	-
Österreich	25 631	25 497 748	8 291	21 371 622	1 782	324 918	35 704	47 194 288	3 667	3 667	-	-	-	-
Portugal	5	5 591	-	-	1	4 460	6	10 051	-	-	-	-	-	-
Schweiz	2 922	7 104 305	2 095	10 359 847	132	60 516	5 149	17 524 668	10 578	10 578	-	-	-	-
Spanien	751	1 730 810	521	2 422 658	44	125 960	1 316	4 279 428	-	-	-	-	-	-
Türkei	337	541 471	-	-	74	171 670	411	713 141	-	-	-	-	-	-
Zusammen	121 499	106 679 169	20 153	72 886 033	19 616	16 954 711	161 268	196 519 963	43 414	43 414	-	-	-	-

1) Die Mehrzahl der Versicherungsträger hat die durchschnittliche Zahl der Renten je Monat, die übrigen haben die Zahl der Renten am Jahresende angegeben.

TABLE 10

Prestations en nature servies aux familles (familles de travailleurs, pensionnés et leurs familles)  
en 1969 (a) (données provisoires et incomplètes)

Pays de résidence	Pays débiteurs						TOTAL
	BELGIQUE	ALLEMAGNE	FRANCE	ITALIE	LUXEMBOURG	PAYS-BAS	
1	2	3	4	5	6	7	8
Montants exprimés en monnaies nationales							
Belgique (FB)	-	4.018.999	151.539.036	9.140.580	2.547.238	-	167.245.853
Allemagne (DM)	4.242	-	.	2.123	2.128	1.864	10.357
France (FF)	1.860.978	936.369	-	1.628.555	206.841	.	4.632.743
Italie (c) (1000lit)	493.432	9.876.588	1.062.652	-	165.677	134.852	11.656.335
Luxembourg (FL)	706.003	624.308	2.171.420	331.411	-	6.863	3.840.005
Pays-Bas (fl)	432.184	203.215	9.485	1.325	2.287	-	648.496
Montants exprimés en francs belges							
Belgique	-	4.018.999	151.539.036	9.140.580	2.547.238	-	167.245.853
Allemagne	57.951	-	-	29.003	29.071	25.464	141.489
France	16.752.915	8.429.390	-	14.660.594	1.862.026	-	41.704.925
Italie	39.474.560	790.127.040	85.012.160	-	13.254.160	4.638.880	932.506.800
Luxembourg	706.003	624.308	2.171.420	331.411	-	6.863	3.840.005
Pays-Bas	5.969.390	2.806.836	131.008	18.301	31.589	-	8.957.124
Total	62.960.819	806.006.573	238.853.624	24.179.889	17.724.084	4.671.207	1.154.396.196

(a) Données partielles

Source: 1969 Rapport annuel de la Commission Administrative,  
exercice 1969 Annexe relative à l'activité de vérification  
des comptes, et aux résultats d'application des règlements  
en 1969, pp. 22-27.



**TABLE 11**

Prestations en nature servies aux autres catégories en 1969 (travailleurs détachés et leurs familles, travailleurs ou pensionnés en séjour temporaire et leurs familles, vacanciers...)

Pays créanciers	Pays débiteurs						TOTAL
	BELGIQUE	ALLEMAGNE	FRANCE	ITALIE	LUXEMBOURG	PAYS-BAS	
1	2	3	4	5	6	7	8
Montants exprimés en monnaies nationales							
Belgique (FB)	-	4.052.097	10.811.628	1.492.223	763.238	2.958.486	20.077.672
Allemagne (DM)	753.648	-	1.523.837	534.838	61.653	687.285	3.561.261
France(a) (FF)	2.729.557	1.261.050	-	835.359	79.843	80.498	4.986.307
Italie(b)(1000Lit.)	135.568	836.107	229.479	-	11.153	11.073	1.223.380
Luxembourg (FL)	1.099.641	789.776	1.971.241	131.730	-	100.325	4.092.713
Pays-Bas (fl)	722.753	1.346.101	109.520	13.928	3.311	-	2.195.613
Montants exprimés en francs belges							
Belgique	-	4.052.097	10.811.628	1.492.223	763.238	2.958.486	20.077.672
Allemagne	10.295.738	-	20.817.445	7.306.530	842.254	9.389.139	48.651.106
France	24.572.045	11.352.228	-	7.520.086	718.764	724.660	44.887.783
Italie	10.845.440	66.888.560	18.358.320	-	892.240	885.840	97.870.400
Luxembourg	1.099.641	789.776	1.971.241	131.730	-	100.325	4.092.713
Pays-Bas	9.982.773	18.592.549	1.512.707	192.375	45.732	-	30.326.136
Total	56.795.637	101.675.210	53.471.341	16.642.944	3.262.228	14.058.450	245.905.810

(a) Données incomplètes.

(b) Données provisoires

Source: 11ème Rapport annuel de la Commission Administrative, exercice 1969 Annexe relative à l'activité de vérification des comptes, et aux résultats d'application des règlements en 1969, pp. 22-27.

**TABLE 12**

Prestations en espèces en cas d'incapacité temporaire de travail :

a) servies pour le compte d'un autre Etat membre en 1969

Pays créanciers	Pays débiteurs						TOTAL
	BELGIQUE	ALLEMAGNE	FRANCE	ITALIE	LUXEMBOURG	PAYS-BAS	
1	2	3	4	5	6	7	8
Montants exprimés en monnaies nationales							
Italie (1000Lit)	2.191	202.292	30.130	-	-	948	245.561
(1)							
Luxembourg (FL)	-	-	71.400	-	-	-	71.400
Pays-Bas (fl)	-	19.162	-	-	-	-	19.162
Montants exprimés en francs belges							
Italie(1)	175.280	16.983.360	2.410.400	-	-	75.840	19.644.880
Luxembourg	-	-	71.400	-	-	-	71.400
Pays-Bas	-	264.668	-	-	-	-	264.668
Total	175.280	17.248.028	2.481.800	-	-	75.840	19.980.948
b) <u>transférées dans un autre Etat membre en 1969</u>							
Montants exprimés en francs belges							
Luxembourg	42.770	24.864	33.154	143.455	-	-	244.243

1) Pour les prestations servies par l'Italie, les données relatives à 1969 n'étant pas encore disponibles, il a été fait usage des montants de 1968.

Source: 11eme Rapport annuel de la Commission Administrative,  
exercice 1969 Annexe relative à l'activité de vérification  
des comptes, et aux résultats d'application des règlements  
en 1969, pp. 22-27.



**TABLE 13**

Pensions et rentes de vieillesse, d'invalidité, d'accident du travail, de maladie professionnelle ou de survie transférées dans un autre Etat membre en 1969

Pays débiteurs	Pays de résidence						TOTAL
	BELGIQUE	ALLEMAGNE	FRANCE	ITALIE	LUXEMBOURG	PAYS-BAS	
1	2	3	4	5	6	7	8
Montants exprimés en monnaies nationales							
Belgique (FB)	-	39.485.807	160.091.296	634.543.594	12.530.851	72.393.554	919.045.102
Allemagne(a) (DM)	22.546.107	-	20.650.252	32.537.998	1.887.870	40.535.645	118.157.872
France (FF)	73.287.135	43.334.551	-	83.060.298	6.126.573	607.356	206.415.913
Italie(b) (1000Lit.)	1.154.311	361.308	2.469.345	-	73.724	17.384	4.033.306
Luxembourg (FL)	102.924.624	54.545.687	30.768.073	78.503.145	-	1.273.530	268.018.059
Pays-Bas (fl)	10.950.978	18.211.889	1.305.872	772.637	110.620	-	31.351.096
Montants exprimés en francs belges							
Belgique	-	39.485.807	160.091.296	634.543.594	12.530.851	72.393.554	919.045.102
Allemagne	308.006.922	-	282.107.264	444.508.163	25.790.573	553.765.635	1.614.178.557
France	659.746.180	390.106.728	-	747.726.245	55.152.697	5.467.546	1.858.199.396
Italie	92.344.880	28.904.640	197.547.600	-	3.086.400	780.960	322.664.480
Luxembourg	102.927.624	54.545.687	30.768.073	78.503.145	-	1.273.530	268.018.059
Pays-Bas	151.256.551	251.545.343	18.036.900	10.671.778	1.527.900	-	433.038.472
Total	1.314.287.57	764.588.05	688.551.133	1.915.952.925	98.088.421	633.681.255	5.415.144.066

a) Non compris les montants servis au titre des "autres prestations" (notamment l'indemnité funéraire en ce qui concerne les victimes d'accident du travail ou de maladie professionnelle).

b) Pour les prestations servies par l'Italie, les données relatives à 1969 n'étant pas encore disponibles, il a été fait usage des montants de 1968.

Source: 11ème Rapport annuel de la Commission Administrative,

exercice 1969 Annexe relative à l'activité de vérification  
des comptes, et aux résultats d'application des règlements  
en 1969, pp. 22-27.

**TABLE 14**

**Allocations familiales et prestations assimilées transférées dans un autre Etat membre ou payées pour des enfants élevés dans un autre Etat membre en 1969  
(Règlement, conventions maintenues en vigueur)**

Pays débiteurs	Pays où sont élevés les enfants						TOTAL
	BELGIQUE	ALLEMAGNE	FRANCE	ITALIE	LUXEMBOURG	PAYS-BAS	
1	2	3	4	5	6	7	8
* Montants exprimés en monnaies nationales							
Belgique (FB)	-	2.051.179	17.630.677	131.684.943	501.290	99.760.799	251.628.888
Allemagne (DM)	87.000	-	376.000	53.955.000	900	3.159.000	57.577.900
France (FF)	19.434.502	4.055.637	-	2.896.092(a)	142.944	46.037	26.575.212
Italie(b)(1000Lit.)	-	-	-	-	-	-	-
Luxembourg (FL)	32.489.728	11.431.309	10.652.761	6.477.011	-	23.713	61.074.522
Pays-Bas (fl)	5.044.637	403.762	32.366	283.451	841	-	5.765.057
Montants exprimés en francs belges							
Belgique	-	2.051.179	17.630.677	131.684.943	501.290	99.760.799	251.628.888
Allemagne	1.188.524	-	5.136.612	737.090.154	12.295	43.155.738	766.583.323
France	174.953.468	36.509.696	-	26.071.228	1.286.812	414.435	239.235.639
Italie	-	-	-	-	-	-	-
Luxembourg	32.489.728	11.431.309	10.652.761	6.477.011	-	23.713	61.074.522
Pays-Bas	69.677.283	5.576.821	447.044	3.915.068	11.616	-	79.627.832
Total	278.309.003	55.569.005	33.867.094	905.238.404	1.812.013	143.354.685	1.418.150.203

a) Non compris les allocations familiales aux travailleurs saisonniers.

b) Les données, très faibles, n'ont pas été reprises.

**Source: 11ème Rapport annuel de la Commission Administrative, exercice 1969 Annexe relative à l'activité de vérification des comptes, et aux résultats d'application des règlements en 1969, pp. 22-27.**



**TABLE 15**

Prestations de chômage servies en 1969 (Montants exprimés en francs belges)  
(Données incomplètes)

Pays ayant servi des prestations, directement ou par l'intermédiaire d'un autre Etat membre					TOTAL FB
BELGIQUE	ALLEMAGNE	ITALIE	LUXEMBOURG	PAYS-BAS	
6 017.205(a)	.	1.092.640	879.583	368.494	8.357.922

(a) Ce montant comprend les allocations familiales payées aux chômeurs.

Source: 11eme Rapport annuel de la Commission Administrative, exercice 1969 Annexe relative à l'activité de vérification des comptes, et aux résultats d'application des règlements en 1969, pp. 22-27.

**TABLE 16**

Récapitulation des montants des prestations servies en 1969 (Données incomplètes)  
Montants exprimés en francs belges

- Soins de santé aux membres de famille	1.154.396.196
- Soins de santé aux autres catégories	245.905.810
- Prestations en espèces en cas d'incapacité temporaire de travail	20.225.191
- Pensions et rentes	5.415.144.066
- Allocations familiales et prestations assimilées	1.418.150.203
- Prestations de chômage	8.357.922
Total FB	8.262.179.388

REMARQUES

- (1) La totalisation des montants servis est faite à titre indicatif.
- (2) Un indice d'évolution parfaitement significatif ne peut être calculé.

Source: 11eme Rapport annuel de la Commission Administrative, exercice 1969 Annexe relative à l'activité de vérification des comptes, et aux résultats d'application des règlements en 1969, pp. 22-27.

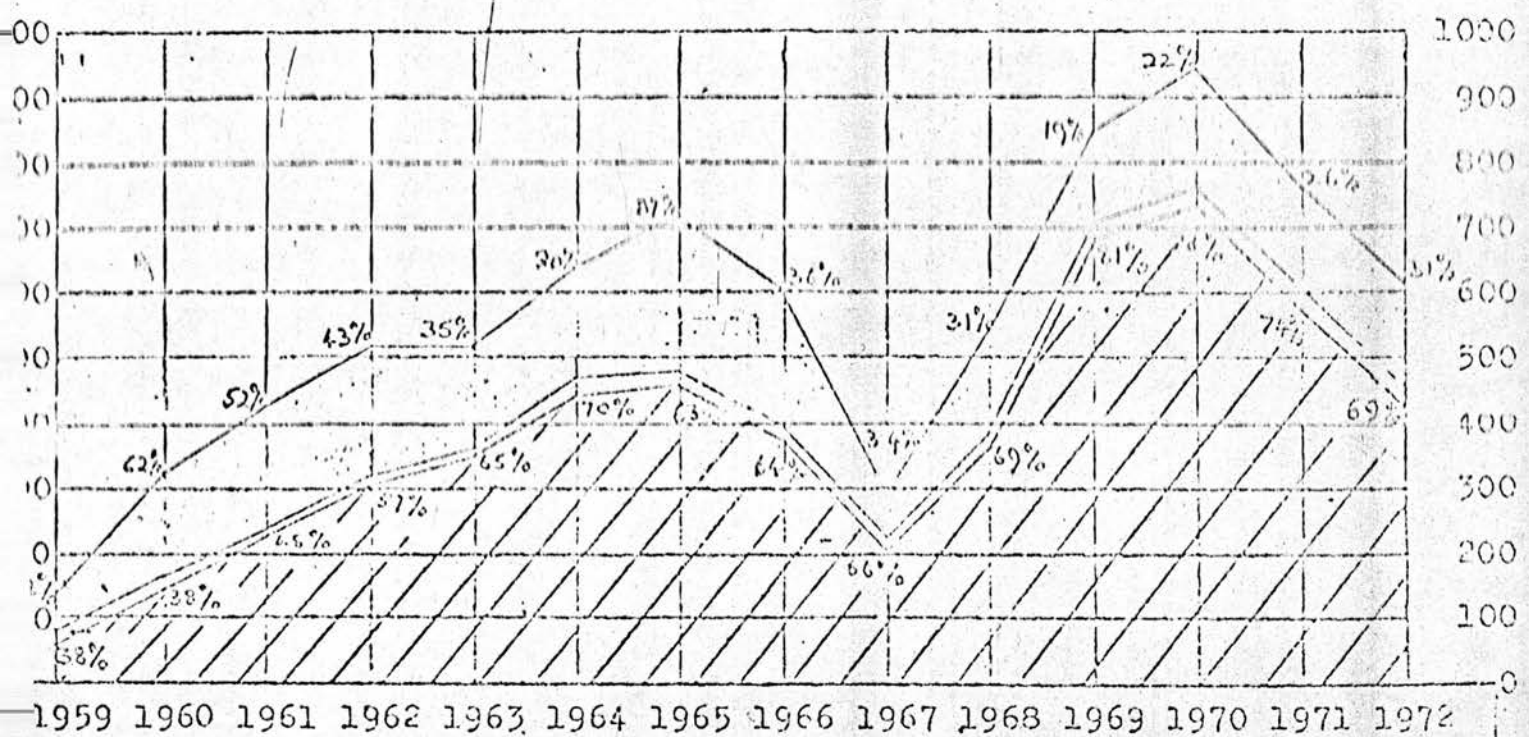
TABLE 17

member countries of the EEC, except for Italy

non-member countries

Italy

(in thousands)



### Notes

(1) abolition of work permits for Community workers as from November 1968.

(2) Belgium: excluding movements between Benelux countries, after November 1968 excluding other Community workers.

Germany: figures for the period 1959-1960 include frontier workers.  
After the abolition of work permits for Community workers as from 1 January 1960, a new method of counting was adopted. As a result, the figures given in respect of the Community workers are not wholly comparable with those of the preceding years.

France: Excluding Algerians, Laotians and nationals of African States South of the Sahara formerly under French administration.

Italy: including seasonal workers.

Luxembourg: including frontier and seasonal workers and movements between Benelux countries.

Netherlands: figures include: frontier and seasonal workers for the period 1959-1967, seasonal workers as from 1968, movements between Benelux countries as from 1969.



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- A. Selective List of Books and Articles consulted for the purposes of this thesis other than those referred to in the text and footnotes.
- B. Books and Articles referred to in the text and footnotes.

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ABBREVIATIONS

AFDI	Annuaire français de droit international
APD	Archives de Philosophie du Droit
ARSP	Archiv für Rechts- und Sozialphilosophie
AWD	Aussenwirtschaftsdienst des Betriebsberaters
CDE	Cahiers de Droit Europeen
CML Rev.	Common Market Law Review
Dr. Soc.	Droit Social
DVZ	Deutsche Versicherungszeitschrift
NJW	Neue Juristische Wochenschrift
RBSS	Revue Belge de Sécurité Sociale
RMC	Revue du Marché Commun
RTDE	Revue Trimestrielle de Droit Europeen
SEW	Sociaal Economische Wetgeving
SMA	Sociaal Maandblad Arbeid
ZRP	Zeitschrift für Rechtspolitik

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- un règlement relatif à l'application des régimes de sécurité sociale aux travailleurs salariés et à leur famille qui se déplacent à l'intérieur de la Communauté
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sociale aux travailleurs salariés et à  
leurs familles qui se déplacent à l'intérieur  
de la Communauté."

Rapporteur: M. Servais.



TRANSLATIONS

TRANSLATIONS

CHAPTER 2

- p.15. "Article 117 starts from the principle that the member states remain basically responsible for their own social policy ..." This is why Art. 117 sets only general guidelines for the social policy of the member states ... and gives to neither the Commission nor the Council the right to be active in the sphere of social policy.
- p.16 "Harmonisation is not synonymous with unification ... One must think not so much of identity as of a common orientation. And that not for any abstract and theoretical end, but in view of the realisation and functioning of the Common Market".
- p.18 (1) "An improvement of living and working conditions is expected to result essentially from the automatic functioning of the Common Market".
- (2) "This means is not sufficient. The social consequences of European integration cannot result solely, and almost automatically, from the realisation of the Treaty in the various sectors: they must also be encouraged and promoted by following the procedures provided for".
- p.21 "The Commission of the EEC has reaffirmed, several times, its competence and its power to undertake, also in the domains indicated by Art. 118, all the studies which it deems necessary, and to organise all the consultations which it deems opportune, especially with the social partners".
- p. 23 "Even if one adopts the view that the single states in the EEC remain basically competent to decide on their own social policy, in the sphere of social security one must conclude on the basis of Art. 117 and Art. 5, paragraph 2 of the EEC Treaty that the individual governments are obliged to see to it that legal differences in the social sphere do not become even greater, but rather diminish".
- p.25 "have an etiological, direct and immediate influence on the Common Market".
- p.26 "A mutual approximation of social security provisions based on social considerations could again be based on Art. 100, by stressing the direct influence on the establishment or the functioning of the common labour market".



Footnotes

2. "These are rules prescribed or recommended by an international organism to the different member states in order to introduce into the legislation of the member states certain tendencies, certain principles, and even minutely elaborated rules".
12. "That harmonisation differs from uniformisation on the one hand and from co-ordination on the other is evident and recognised by everybody".
20. "By 'the procedures provided for in this Treaty', one can and must, in our opinion, also think of the procedures for the co-ordination of economic policy, the basis of which is established by Art. 105 and 145, and of the other competences in the economic sphere ..."
21. "By 'the procedures provided for in this Treaty', one should evidently understand all provisions relating directly or indirectly to labour, and thus especially Art. 48-51, Art. 118 and Art. 123-128".
22. "By following the procedures provided for" ... "that is, by those particular institutions which make up the Community social policy. By that we mean the free movement of persons, the functioning of the Social Fund, the establishment of the common policy of professional training, the realisation of equal wages for men and women, the close collaboration which must be established between the member states in the social sphere".
33. "A recommendation defines what line of action is to be adopted and is equivalent to a directive, except that it does not have the same binding force; an opinion expresses an appreciation of a certain situation or of the methods and means to be adopted to reach certain objectives, certain results".
59. "the lack of balance which exists in the Treaty between the general aims, which can very well be defined in a very social manner, and the means and instruments which have been provided for the implementation of social policy".

CHAPTER 3

- p.35. "The authors of the Treaty) based themselves on the principle that it was necessary to regulate everything which might artificially disturb the rules of competition, in other words, everything which might lead to distortions on the economic plane, but that the regulation of social conditions and social policy as such - i.e. independently of the efforts to bring about economic unity - was not necessary".
- pp. 36-37 "The need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained".
- p. 37 "They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action."
- p. 43 "Harmonisation remains an objective because it conveys the will to social progress as implied in "improvement of living and working conditions".
- p.57 "The system of social insurance in France - model for the harmonisation of social policy in the EEC?"
- p.58 (1) "In any case, one should try with every means to keep social security within some limits, so that it does not impress upon the social order a collectivist stamp, which would certainly be undesirable in the long run".
- (2) "Are levelling down and super bureaucracy the European fate?".
- (3) "To mobilise, not only in the Federal Republic but in the whole of Western Europe, the forces which support those who think it is time not to extend but to check the growth of social insurance".
- p.59 (1) "We should not, however, overlook the fact that there can be opposed tendencies; there are, as is known, forces which, if in different forms, exist in all parties and in all countries and which aim at reducing, in this time of rising affluence, the number of risks covered by society, or at least the degree to which they are covered, and thus relieving the social budget of some of its burden".
- (2) "The very narrow margin which the use of the social product leaves free for the harmonisation (in the sense of approximation) of the social systems can be broadened, and the process of such a harmonisation accelerated, to the extent to which those forces within the inherent dynamic of national development are strengthened, which moderate or even cancel the upward trend (of costs)".



- p.61 "The statement of international science that re-distribution becomes questionable from a certain point onwards".
- p.62 "That is to say, half of a minimum considered, ex hypothesi, to be incompressible".
- p.68 "But now a more developed economic analysis is necessary to determine the margin available and the optimal division of the growth in the national income, especially between the present and the future, that is, between consumption and investment, with the clear awareness that this choice will condition the economic and social future".
- p.69 "The economic and social effect of social contributions and benefits is extremely important from the point of view of incomes policy".
- p.70 "Incomes policy cannot avoid taking an interest in the development of social benefits and the methods by which they are financed".
- p.71 (1) "The reform of social policy by means of a German social plan".
- (2) "Where one must stop recognising demands, because the economy cannot support them any more or because achievement incomes (i.e. take-home income differentials) would have to be cut too much".
- p.74 "Wherever possible, one should try, within the limits set by its aims, to orient social policy to the needs of conjunctural policy".
- p.75 "Social security has been, above all, a victory for the working class, over itself".
- p.76 "One of the basic pre-conditions of our market-economic order".
- p.78 "To give the lie to that impression by assigning to the European construction goals which would attract popular support".
- p.79 (1) "Economic and monetary union will not be able to function without a social policy, because the development of incomes, of wage costs, of all the social charges borne by enterprises is at the heart of the problem of economic and monetary policy as of social policy; it broadly determines the development of prices ... Social security expenditure has now reached a sum close to that of the state budget and exercises on the economic and monetary equilibrium an influence comparable to that of the budget".
- (2) "Once they form part of a single market, states in fact lose their autonomy in social policy".

- p.82 "The goal is not to achieve social uniformity within the EEC, but to have a relatively comparable rhythm of progress, while at the same time reducing excessive distortions a little".

Footnotes

2. "The Treaty sees the unification of Europe, the creation of the Common Market, to a high degree primarily from the point of view of economic policy; its goal is an economically efficient "Economic" Community. For the Treaty, questions of social policy therefore play a subordinate role".
10. "There is no doubt that the national systems now in force must be progressively adapted until one day they blend into a common system".
35. "This does not mean that the trade unions have not used the Communities to solve national problems. One could say that the Communities, in a certain sense and in certain cases, have enlarged the possibilities of national trade union action. This is so true that certain governments have accused the European Economic Commission of having used the trade unions as pressure groups against them".
84. "The fact that there is a rise in social expenditure tells us as little about the economy as the fact that a man sharply increases his expenditure by cheque vis-a-vis his cash expenditure tells us about the state of his finances. Such an increase, however great it may be, is not in itself cause for anxiety ...".
134. "A further point has to be considered in relation to incomes policy: everything that falls within the concept of social security ...".
138. "Distinct moderation of Brussels' harmonisation policy"....  
"One can actually speak of a reversal of the fronts ..."  
..."the new and welcome realistic view of harmonisation"  
..."necessity of relating the social and economic aims"  
... "Happily, that sounds somewhat different from the earlier Veillon proposals".
140. "This talk became the point of departure for scientific attempts to make social benefits transparent and to clarify their position in the economy as a whole".
142. "wrong political decisions": "This danger is greatest when such forecasts indicate surpluses which appear to point to politically desired possibilities of extending benefits. The calculations of the Federal Government are constantly being misinterpreted as genuine prognoses and so being made the basis of demands and of decisions which have the effect of increasing expenditure".



147.

"At the moment in which, at a particularly difficult point in the international economic conjuncture, the French economy must also, to meet the particular demands of the Common Market, undertake an extremely severe review of all elements which may contribute to increasing the cost price of its products beyond competitive possibilities, the constantly growing cost of social security is the source of the gravest anxiety".

CHAPTER 4

- p.85 "Social harmonisation possesses a particular legal basis in the combined provisions of Art. 117 and 118 of the Treaty, since the close collaboration between the member States in the social domain provided for by Art. 118 has no purpose if it is not to attain the objective of realising through social harmonisation the improvement of the living and working conditions of workers ...".
- p.86 "The social provisions of the EEC Treaty are thus, contrary to the opinion of the EEC organs, not at all unprecise, but rather very precise in the limitation of the EEC competence and powers".
- pp. 86-87 "The Treaty instituting the EEC nowhere contains the obligation to proceed to a harmonisation in the social domain, not even in the domain of social security. It starts from the hypothesis that states which unite to constitute an economic community remain autonomous. In these circumstances, there exists, according to the Treaty, no 'common' or 'community' social policy. Moreover, the Commission of the EEC is not empowered to formulate proposals and the Council of the EEC is not authorised to make any binding rules in this domain".
- p.88 "Pragmatism in the legal approach of the EEC organs to the harmonisation of European social policy".
- p.89 "that social policy has come to be seen also as an integral part of economic policy".
- p.90 "By 'the procedures provided for in this Treaty', one can and must, in our opinion, also think of the procedures for the co-ordination of economic policy, the basis of which is established by Art. 105 and 145, and of the other competences in the economic sphere ... We have already pointed to the fact that practice has already been going in this direction for several years".



CHAPTER 5

- p.126 "on the principles and the spirit of the present regulation".
- p.131 (1) "The establishment of the greatest possible freedom of movement of workers, being one of the "foundations" of the Community, thus constitutes the principal aim of Art. 51 and hence conditions the interpretation of the regulations made under this regulation".
- (2) "These provisions aim to establish the greatest possible freedom of movement of workers. This goal involves the elimination of legislative obstacles which might be to the disadvantage of migrant workers".
- p.135 "In order to define the sense and the scope of this provision (Art. 11(2)), it is necessary to interpret it in the light of Art. 48 to 51 of the Treaty which constitute the basis, the framework and the limits of the social security regulations.
- "As the aim of these articles is to ensure the free movement of workers by conferring on them certain rights, it would be going beyond the finality and the framework of the said provisions to impose on workers a reduction of their rights which was not compensated for by advantages provided for in the regulations".
- p.136 (1) "In accordance with the spirit of Articles 48-51 of the Treaty, as of Regulation no. 3, which is to prevent, over and above the protection of the migrant worker *stricto sensu*, that in the domain of social security, territoriality clauses should be opposed to workers and their survivors".
- (2) "The aim of eliminating the territorial partitioning of social security is the connecting thread which runs through the whole of Regulation No. 3 ... This is in fact an essential objective of the Treaty: over and above the protection of the migrant worker himself, to eliminate territoriality clauses".
- p.137 "Article 51 cannot allow the regulations to contravene the objectives laid down, which are designed to favour the free movement of workers, and which would be incompatible with a possible reduction of their rights".
- p.138 "If one had to restrict oneself to the text of Regulation No. 3, the interpretation could hardly raise any difficulties in my opinion ... (but) such a method of interpretation is not sufficient for the texts of Community law".
- pp. 142-143 "Articles 48 to 51 of the Treaty do not allow one to forbid a State to apply to all its population, including those of its nationals who work in another member country, a complement of social protection".
- p.143 "Article 53 is no obstacle to solutions which might be more advantageous for the insured persons, contained in national legislations".

- p.145 "The application of these provisions shall be the subject of bilateral agreements".
- p.146 "Thus, the second paragraph owes its existence to the prudence of its authors, who desired to allow the member States to regulate among themselves the possible details of application".
- p.147 "arbitrarily decide on the scope of application".
- p.151 (1) "It would not be in accordance with this spirit to limit the notion of "worker" solely to migrant workers *stricto sensu* or solely to movements which relate to the exercise of their employment."
- "Nothing in Article 51 imposes such distinctions which would be capable, moreover, of making impracticable the application of the rules envisaged.
- "On the contrary, the system adopted for Regulation No. 3, which consists of suppressing, as far as possible, the territorial limits to the application of the different social security regimes, corresponds well to the objectives of Article 51 of the Treaty".
- (2) "to every employed worker or person treated as such who is placed in one of the situations of international character provided for by the said regulation, and to his survivors".
- p.152 (1) "social security of migrant workers"... "on the application of social security schemes to employed persons and their families moving within the Community".
- (2) "employed workers or persons treated as such".
- p.153 "Such an assimilation exists whenever, as the result of a national legislation, the provisions of a general social security scheme are extended to persons other than the employed workers provided for in Regulation No. 3, whatever be the forms or modalities used by the national legislation;
- "Artisans must therefore be considered to be assimilated to employed workers to the extent that they are protected, by virtue of a national legislation, against one or more risks organised for the benefit of the generality of workers"
- p.154 "The aim of Articles 48 to 51 would not be attained but rather contravened if the periods of insurance acquired by the worker in accordance with the legislation of a member State were to be lost to him when, taking advantage of the free movement which is guaranteed to him, he changes his place of work and is thus subjected to a social security scheme of another member State.
- "This conclusion is moreover confirmed by Article 9 (1) of Regulation No. 3".



- p.156 (1) "the classical distinctive criteria of a social assistance benefit, namely the scope of its application, the means tests to which its grant is made subject, and the means by which it is financed, are no longer sufficient".
- (2) "thus escaping all global classification".
- p.157 (1) "In view of the wide definition of the circle of beneficiaries, such a legislation fulfils, in reality, a double function, consisting, on the one hand, of guaranteeing a minimum of the means of existence to persons placed entirely outside the social security system, and, on the other, of ensuring a supplementary income for recipients of inadequate social security benefits".
- (2) "the rule of equality of treatment which is one of the fundamental principles of Community law, embodied, in this case, in Article 8 of Regulation No. 3".
- p.159 "the provisions of Regulation No. 3 are opposed to ..."
- p.164 "if it is a question of the acquisition, the maintenance or the recovery of the right to benefits which are the object of Art. 27".
- p.167. "vis-a-vis the situation which would result for him from the exclusive application of internal law."
- p.169 "in the double perspective of the suppression of discriminations and the realisation of free movement. ... The two aims are, moreover, linked, whether the discrimination is to the advantage or the disadvantage of the migrant".
- p.170 "a manner of proceeding which seems quite foreign to the legal tradition of the six member States".
- p.172 (1) "at least in the context of those systems with periods, where retirement pension varies uniquely as a function of the periods of insurance completed."
- (2) "However, the complexity of the problems posed by the co-ordination of national legislations makes it impossible to erect the interpretation given above into an absolute principle".
- p.174 "The tone of this document and the lack of information on the Community regulations and on your case law on which it is apparently based made me hesitate as to whether I should speak to you about it other than to dismiss it without discussion, recalling simply the old proverb of my province of origin: 'the curate wastes his time by saying mass twice for the deaf'".

- p.175 "Invoking the principle of Article 51 of the Treaty to dismiss a precise article of Regulation No. 3 may offend against certain principles of legal interpretation. Invoking the free movement of workers to put aside a text precisely inscribed in the regulation designed to facilitate that free movement is a rather hasty argument".
- p.181 "This situation, however regrettable it may be, results from the strict application of the texts now in force and cannot be improved in any way on the judicial level".
- p.190 (1) "The interpretative judgments of the Court of Justice of the European Communities are of a general character, for they are designed to unify the case law of the courts of the various member States, and hence they are binding on those courts".
- (2) "Since the mission of the Court of the European Communities is in particular to define the law in cases in which there arises a question of interpretation of the provisions of the Treaty or of acts of the Community institutions, the decisions given by it in the framework of Articles 177 and 219 of the Treaty form an integral part of Community law and hence participate in the primacy of the Treaty over internal legislation.

Therefore they are binding on the national courts in the same way as Community law. Respect for the interpretation given by the Court of Justice is directly and intimately linked to respect for the Treaty itself".

#### Footnotes

1. "The social security of migrant workers is a subject reputed to be difficult, which, it is said, only a few rare specialists in each country are capable of mastering".
3. "As for the corresponding movements of funds, they are estimated for 1967 at nearly 140 million units of account. To this sum must be added the amount of benefits provided by the different member States to nationals of other member States, in application of internal legislation".
25. "A rather barbarous but convenient term".
101. "If these difficulties cannot be resolved entirely except within the framework of a legislative intervention by the Community, this circumstance cannot, however, affect the right and the duty of the courts to ensure the protection of migrant workers in all cases in which this is possible, while respecting the principles of Community social legislation and without disturbing the national system of legislation in question".
130. "It results from the very text of Article 51 that the article aims to cover, above all, the case where the



legislation of a member State, taken on its own, would not open to the insured person a right to benefits, because of the insufficient number of periods completed under that legislation".

139.

"If such a manner of proceeding leads, in certain cases, to putting the migrant worker in a more advantageous position than the nationals of the country in which he works, this is the result, not of the interpretation of Community law, but of the system now in force which, in the absence of a common social security scheme, rests on a simple co-ordination of national legislations which have not yet been harmonised".

CHAPTER 6

- p.209 "The social security of migrants is at a knot of conflicting interests: interests of the States, first of all, varying according to whether they are primarily "exporters" or "importers" of labour, but also interests of the social partners and particularly those of the workers, which do not always coincide with the interests of their country of origin, nor with those of their successive employers".
- p.224 "It is essential to note the very important factor of expansion which an afflux of labour can constitute for a country".
- p.235 (1) "Generally, a social security agreement is preceded by the phenomenon of the movement of workers, leaving the country of emigration, where the possibilities of employment are limited, and going to the country of immigration where there is a penury of labour. This movement is generally preceded by an Agreement between the two countries relating to the number of migrant workers to the conditions of recruitment and employment, etc.".
- (2) "If it is evident that at this stage of the operation, economic motives are preponderant, when a social security agreement is concluded, on the other hand, social considerations prevail".
- p.238. "On the diplomatic field, and with the object of protecting nationals abroad, discriminations often constitute a factor in negotiations, an exchange token in international discussions".
- p.239 "Agreements which are inspired by socio-economic motives" and "agreements which are inspired by considerations based on the international policy of a country".
- p.241 "The creation of new resources, the utilisation of unemployed resources, the pooling of factors of production are, after all, the essential contribution which a common market must make to raising the standard of living".
- pp. 241-2 "One could even take the view that there is a common interest in facilitating the movement of labour in proportion to its lack of qualification: it is in fact the less qualified labour which has the most difficulty in finding employment in the countries in which there is high unemployment; in the countries of immigration, this labour takes the place of national workers, who can thus seek better paid and less repulsive work".



- p.243 "That much more can be achieved through multilateral agreements on the free movement of workers seems doubtful, unless the goals pursued by closer economic co-operation can be defined somewhat more broadly than has been possible until now. One may expect, in our opinion, that, after the realisation of concrete results in other areas of economic co-operation - a significant reduction of trade barriers, for example - the individual countries may gradually be prepared to adopt a more flexible attitude to the admission of foreign workers".
- p.246 "The progressive dismantling of trade barriers means that individual countries or regions no longer lie in the lee of competition and are no longer able to face up to international competition. Regional redundancy or wage reductions to raise competitiveness would be the consequence. In these cases, the international mobility of labour is appropriate to free of their burden the labour markets in the less favoured areas".
- p. 248. "all arrangements that are necessary to ensure that provisions relating to social security do not constitute an obstacle to movements of labour".
- p.249 "This shows the necessity of a firmer stand in the negotiation ... This necessity is so much the stronger if one considers that the workers interested in the free movement, to adopt the Community terminology, are almost all Italian workers?
- p.250 "It seemed reasonable, indeed, to divide these costs between the three parties, for the following reasons:
- the country of the place of work benefits from the activity of the immigrant workers;
  - the country of residence benefits also, for its economy is indirectly relieved by the departure of under-employed workers, and directly helped by the consumption on its soil of a part of the earnings won by the said workers in the country where they are employed;
  - the Community, because it benefits from the advantages resulting from the freedom of movement of workers".
- p.253 "It is necessary to emphasise that if this principle (Community priority) had not been established, free movement would have remained a theoretical right and would not have allowed workers interested in migrating to enjoy more favourable conditions, seeing that the employers of the member States would probably prefer to hire workers (and such is the case of workers from third countries) who dispose, in general, of less legal protection".
- p.254 "But there are other reasons which, according to observers, are fairly important in leading employers to hire extra-Community labour: in the first place the stability resulting from the fact that the rupture of the contract of employment would involve immediate return to the country of origin, and, moreover, the fact that extra-Community workers, not enjoying

the protection ensured by Consulates and not having associations and organisms of a trade union type, are much less demanding than certain Community workers".

p.262. "Social security is at a knot of conflicting interests".

#### Footnotes

58. "that, through greed, we should, in the middle of the twentieth century, keep foreign workers imprisoned as conjuncture-coolies in conditions of the early capitalist nineteenth century".
119. "For several years, the free movement of workers was the cream bun of Europeans".
126. "In order to enter into force, it required the normal procedure of ratification by the Parliaments of the six countries: this would have involved a considerable loss of time and might perhaps have compromised its fulfilment because of the possible imposition of obstacles and refusals by these legislative organs. So, to avoid these inconveniences, the Council of Ministers of the European Economic Community found it opportune to adopt the Convention and to apply it through its own provisions".
146. "In the year covered by the report, we have, together with the B.D.A., opposed all attempts by the EEC to make the entry of workers from third countries more difficult as free movement within the Community is gradually realised".
152. "But even for Italian workers, the pressure of their government for the establishment of free movement finally brought them no real benefit".
172. "In order to displace foreign investments to the country of origin of the foreign workers and to stimulate additional direct investments in them, the Federal Government should insist that controls and limitations on the right of establishment of foreign companies should be abandoned in those countries. The acceptance of workers in the Federal Republic should have as its necessary counterpart the free establishment of companies, the free movement of capital and the securing of property rights in the countries of origin of the foreign workers ... corresponding to these measures, it would be appropriate for the countries of origin to adopt a policy of purposefully bringing about comparative advantages for labour-intensive products by shaping wages and the rate of exchange in such a way as to bring about a low valuation of the currency".



179.

"Also from the supply side, there are hardly any limits set to the further increase in the employment of foreign labour for the foreseeable future. In Turkey alone, for example, there were on the register in 1971 more than a million workers who want to work in the Federal Republic".